SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title; References; Table of Contents. The short title of this measure is the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act").

TITLE I. NEEDS-BASED BANKRUPTCY

Sec. 101. Conversion. Under current law, section 706(c) of the Bankruptcy Code provides that a court may not convert a chapter 7 case unless the debtor requests such conversion. Section 101 of the Act amends this provision to allow a chapter 7 case to be converted to a case under chapter 12 or chapter 13 on request or consent of the debtor.

Section 102. Dismissal or Conversion. This provision implements the legislation's principal consumer bankruptcy reforms: needs-based debt relief. Under section 707(b) of the Bankruptcy Code, a chapter 7 case filed by a debtor who is an individual may be dismissed for substantial abuse only on motion of the court or the United States trustee. It specifically prohibits such dismissal at the suggestion of any party in interest.

Section 102 of the Act revises current law in several significant respects. First, it amends section 707(b) of the Bankruptcy Code to permit – in addition to the court and the United States trustee – a trustee, bankruptcy administrator, or a party in interest to seek dismissal or conversion of a chapter 7 case to one under chapter 11 or 13 on consent of the debtor, under certain circumstances. In addition, section 102 of the Act changes the current standard for dismissal from "substantial abuse" to "abuse." Section 102 of the Act also amends Bankruptcy Code section 707(b) to mandate a presumption of abuse if the debtor's current monthly income (reduced by certain specified amounts) when multiplied by 60 is not less than the lesser of 25 percent of the debtor's nonpriority unsecured claims or $6,000 (whichever is greater), or $10,000.

To determine whether the presumption of abuse applies under section 707(b) of the Bankruptcy Code, section 102(a) of the Act specifies certain monthly expense amounts that are to be deducted from the debtor's "current monthly income" (a defined term). These expense items include:

- the applicable monthly expenses for the debtor as well as for the debtor's dependents and spouse in a joint case (if the spouse is not otherwise a dependent) specified under the Internal Revenue Service's National Standards (with provision for an additional five percent for food and clothing if the debtor can demonstrate that such additional amount is reasonable and necessary) and the IRS Local Standards;

- the actual monthly expenses for the debtor, the debtor's dependents, and the debtor's spouse in a joint case (if the spouse is not otherwise a dependent) for the categories specified by the Internal Revenue Service as Other Necessary Expenses;

- reasonably necessary expenses incurred to maintain the safety of the debtor and the debtor's family from family violence as specified in section 309 of the Family Violence Prevention and Services Act or other applicable federal law, with provision for the confidentiality of these expenses;

- reasonably necessary expenses for health insurance, disability insurance, and health savings account expenditures for the debtor, the debtor's spouse, and dependents of the debtor;

- the debtor's average monthly payments on account of secured debts and priority claims as explained below; and

- if the debtor is eligible to be a debtor under chapter 13, the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to 10 percent of projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

With respect to secured debts, Section 102(a)(2)(C) of the Act specifies that the debtor's average monthly payments on account of secured debts is calculated as the sum of the following divided by 60: (1) all amounts scheduled as contractually due to secured creditors for each month of the 60-month period following filing of the case; and (2) any additional payments necessary, in filing a plan under chapter 13, to maintain possession of the debtor's primary residence, motor vehicle or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts.

With respect to priority claims, section 102(a)(2)(C) of the Act specifies that the debtor's expenses for payment of such claims (including child support and alimony claims) is calculated as the total of such debts divided by 60.

The provision permits a debtor, if applicable, to deduct from current monthly income the continuation of actual expenses paid by the debtor that are reasonable and necessary for the care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (providing such individual is unable to pay for these expenses).

Under section 102, a debtor may also deduct the actual expenses for each dependent child of a debtor to attend a private or public elementary or secondary school of up to $1,500 per child if the debtor: (1) documents such expenses, and (2) provides a detailed explanation of why such expenses are reasonable and necessary. In addition, the debtor must explain why such expenses are not already accounted for under any of the Internal Revenue Service National and Local Standards, and Other Expenses categories.

Other expenses that a debtor may claim include additional housing and utilities allowances based on the debtor's actual home energy expenses if the debtor documents such expenses and demonstrates that they are reasonable and necessary.

While the Act replaces the current law's presumption in favor of granting relief requested by a chapter 7 debtor with a presumption of abuse (if applicable under the income and expense analysis previously described), this presumption may be rebutted only under certain circumstances. Section 102(a)(2)(C) of the Act amends Bankruptcy Code section 707(b) to provide that the presumption of abuse may be rebutted only if: (1) the debtor demonstrates special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative; and (2) the additional expenses or adjustments cause the product of the debtor's current monthly income (reduced by the specified expenses) when multiplied by 60 to be less than the lesser of 25 percent of the debtor's nonpriority unsecured claims, or $6,000 (whichever is greater); or $10,000. In addition, the debtor must itemize and document each additional expense or income adjustment as well as provide a detailed explanation of the special circumstances that make such expense or adjustment necessary and reasonable. In addition, the debtor must attest under oath to the accuracy of any information provided to demonstrate that such additional expense or adjustment is required.

To implement these needs-based reforms, the Act requires the debtor to file, as part of the schedules of current income and current expenditures, a statement of current monthly income. This statement must show: (1) the calculations that determine whether a presumption of abuse arises under section 707(b) (as amended), and (2) how each amount is calculated.

An exception to the needs-based test applies with respect to a debtor who is a disabled veteran whose indebtedness occurred primarily during a period when the individual was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)).

In a case where the presumption of abuse does not apply or has been rebutted, section 102(a)(2)(C) of the Act amends Bankruptcy Code section 707(b) to require a court to consider whether: (1) the debtor filed the chapter 7 case in bad faith; or (2) the totality of the circumstances of the debtor's financial situation demonstrates abuse, including whether the debtor wants to reject a personal services contract and the debtor's financial need for such rejection.

Under section 102(a)(2)(C) of the Act, a court may on its own initiative or on motion of a party in interest in accordance with rule 9011 of the Federal Rules of Bankruptcy Procedure, order a debtor's attorney to reimburse the trustee for all reasonable costs incurred in prosecuting a section 707(b) motion if: (1) a trustee files such motion; (2) the motion is granted; and (3) the court finds that the action of the debtor's attorney in filing the case under chapter 7 violated rule 9011. If the court determines that the debtor's attorney violated rule 9011, it may on its own initiative or on motion of a party in interest in accordance with such rule, order the assessment of an appropriate civil penalty against debtor's counsel and the payment of such penalty to the trustee, United States trustee, or bankruptcy administrator. This provision clarifies that a motion for costs or the imposition of a civil penalty must be made by a party in interest or by the court itself in accordance with rule 9011.

Section 102(a)(2)(C) of the Act provides that the signature of an attorney on a petition, pleading or written motion shall constitute a certification that the attorney has: (1) performed a reasonable investigation into the circumstances that gave rise to such document; and (2) determined that such document is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under section 707(b)(1). In addition, such attorney's signature on the petition constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

Section 102(a)(2)(C) of the Act amends section 707(b) of the Bankruptcy Code to permit a court on its own initiative or motion by a party in interest in accordance with rule 9011 of the Federal Rules of Bankruptcy Procedure to award reasonable costs (including reasonable attorneys' fees) in contesting a section 707(b) motion filed by a party in interest (other than a trustee, United States trustee or bankruptcy administrator) if the court: (1) does not grant the section 707(b) motion; and (2) finds that either the movant violated rule 9011, or the attorney (if any) who filed the motion did not comply with section 707(b)(4)(C) and such was made solely for the purpose of coercing a debtor into waiving a right guaranteed under the Bankruptcy Code to such debtor. An exception applies with respect to a movant that is a "small business" with a claim in an aggregate amount of less than $1,000. A small business, for purposes of this provision, is defined as an unincorporated business, partnership, corporation, association or organization that engages in commercial or business activities and employs less than 25 full-time employees. The number of employees of a wholly owned subsidiary includes the employees of the parent and any other subsidiary corporation of the parent. Section 102(a)(2)(C) of the Act clarifies that the motion for costs must be made by a party in interest or by the court. The use of the phraseology in this provision, "in accordance with rule 9011 of the Federal Rules of Bankruptcy Procedure," is intended to indicate that the procedures for the motion of a party in interest or a court acting on its own initiative are the procedures outlined in rule 9011(c).

The Act includes two "safe harbors" with respect to its needs-based reforms. One safe harbor allows only a judge, United States trustee, or bankruptcy administrator to file a section 707(b) motion (based on the debtor's ability to repay, bad faith, or the totality of the circumstances) if the chapter 7 debtor's current monthly income (or in a joint case, the income of the debtor and the debtor's spouse) falls below the state median family income for a family of equal or lesser size (adjusted for larger sized families), or the state median family income for one earner in the case of a one-person household.

The Act's second safe harbor only pertains to a motion under section 707(b)(2), that is, a motion to dismiss based on a debtor's ability to repay. It does not allow a judge, United States trustee, bankruptcy administrator or party in interest to file such motion if the income of the debtor (including a veteran, as that term is defined in 38 U.S.C. § 101) and the debtor's spouse is less than certain monetary thresholds. This provision does not consider the nonfiling spouse's income if the debtor and the debtor's spouse are separated under applicable nonbankruptcy law, or the debtor and the debtor's spouse are living separate and apart, other than for the purpose of evading section 707(b)(2). The debtor must file a statement under penalty of perjury specifying that he or she meets

one of these criteria. In addition, the statement must disclose the aggregate (or best estimate) of the amount of any cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income.

Section 102(b) of the Act amends section 101 of the Bankruptcy Code to define "current monthly income" as the average monthly income that the debtor receives (or in a joint case, the debtor and debtor's spouse receive) from all sources, without regard to whether it is taxable income, in a specified six-month period preceding the filing of the bankruptcy case. The Act specifies that the six-month period is determined as ending on the last day of the calendar month immediately preceding the filing of the bankruptcy case, if the debtor files the statement of current income required by Bankruptcy Code section 521. If the debtor does not file such schedule, the court determines the date on which current income is calculated.

"Current monthly income" includes any amount paid by any entity other than the debtor (or, in a joint case, the debtor and the debtor's spouse if not otherwise a dependent) on a regular basis for the household expenses of the debtor or the debtor's dependents (and, the debtor's spouse in a joint case, if not otherwise a dependent). It excludes Social Security Act benefits and payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes. In addition, the Act provides that current monthly income does not include payments to victims of international or domestic terrorism as defined in section 2331 of title 18 of the United States Code on account of their status as victims of such terrorism.

Section 102(c) of the Act amends section 704 of the Bankruptcy Code to require the United States trustee or bankruptcy administrator in a chapter 7 case where the debtor is an individual to: (1) review all materials filed by the debtor; and (2) file a statement with the court (within ten days following the meeting of creditors held pursuant to section 341 of the Bankruptcy Code) as to whether or not the debtor's case should be presumed to be an abuse under section 707(b). The court must provide a copy of such statement to all creditors within five days after its filing. Within 30 days of the filing of such statement, the United States trustee or bankruptcy administrator must file either: (1) a motion under section 707(b); or (2) a statement setting forth the reasons why such motion is not appropriate in any case where the debtor's filing should be presumed to be an abuse and the debtor's current monthly income exceeds certain monetary thresholds.

In a chapter 7 case where the presumption of abuse applies under section 707(b), section 102(d) of the Act amends Bankruptcy Code section 342 to require the clerk to provide written notice to all creditors within ten days after commencement of the case stating that the presumption of abuse applies in such case.

Section 102(e) of the Act provides that nothing in the Bankruptcy Code limits the ability of a creditor to give information to a judge (except for information communicated *ex parte*, unless otherwise permitted by applicable law), United States trustee, bankruptcy administrator, or trustee.

Section 102(f) of the Act adds a provision to Bankruptcy Code section 707 to permit the court

to dismiss a chapter 7 case filed by a debtor who is an individual on motion by a victim of a crime of violence (as defined in section 16 of title 18 of the United States Code) or a drug trafficking crime (as defined in section 924(c)(2) of title 18 of the United States Code). The case may be dismissed if the debtor was convicted of such crime and dismissal is in the best interest of the victims, unless the debtor establishes by a preponderance of the evidence that the filing of the case is necessary to satisfy a claim for a domestic support obligation.

Section 102(g) of the Act amends section 1325(a) of the Bankruptcy Code to require the court, as a condition of confirming a chapter 13 plan, to find that the debtor's action in filing the case was in good faith.

Section 102(h) of the Act amends section 1325(b)(1) of the Bankruptcy Code to specify that the court must find, in confirming a chapter 13 plan to which there has been an objection, that the debtor's disposable income will be paid to unsecured creditors. It also amends section 1325(b)(2)'s definition of disposable income. As defined under this provision, the term means income received by the debtor (other than child support payments, foster care payments, or certain disability payments for a dependent child) less amounts reasonably necessary to be expended for: (1) the maintenance or support of the debtor or the debtor's dependent; (2) a domestic support obligation that first becomes due after the case is filed; (3) charitable contributions (as defined in Bankruptcy Code section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in Bankruptcy Code section 548(d)(4)) in an amount that does not exceed 15 percent of the debtor's gross income for the year in which the contributions are made; and (4) if the debtor is engaged in business, the payment of expenditures necessary for the continuation, preservation, and operation of the business. As amended, section 1325(b)(3) provides that the amounts reasonably necessary to be expended under section 1325(b)(2) are determined in accordance with section 707(b)(2)(A) and (B) if the debtor's income exceeds certain monetary thresholds.

Section 102(i) of the Act amends Bankruptcy Code section 1329(a) to require the amounts paid under a confirmed chapter 13 plan to be reduced by the actual amount expended by the debtor to purchase health insurance for the debtor and the debtor's dependents (if those dependents do not otherwise have such insurance) if the debtor documents the cost of such insurance and demonstrates such expense is reasonable and necessary, and the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b). If the debtor previously paid for health insurance, the debtor must demonstrate that the amount is not materially greater than the amount the debtor previously paid. If the debtor did not previously have such insurance, the amount may not be not materially larger than the reasonable cost that would be incurred by a debtor with similar characteristics. Upon request of any party in interest, the debtor must file proof that a health insurance policy was purchased.

Section 102(j) of the Act amends section 104 of the Bankruptcy Code to provide for the periodic adjustment of monetary amounts specified in sections 707(b) and 1325(b)(3) of the Bankruptcy Code, as amended by this Act.

Section 102(k) adds to section 101 of the Bankruptcy Code a definition of "median family income."

Sec. 103. Sense of Congress and Study. Section 103(a) of the Act expresses the sense of Congress that the Secretary of the Treasury has the authority to alter the Internal Revenue Service expense standards to set guidelines for repayment plans as needed to accommodate their use under section 707(b) of the Bankruptcy Code, as amended. Section 103(b) requires the Executive Office for United States Trustees to submit a report within two years from the date of the Act's enactment regarding the utilization of the Internal Revenue Service expense standards for determining the current monthly expenses of a debtor under section 707(b) and the impact that the application of these standards has had on debtors and the bankruptcy courts. The report may include recommendations for amendments to the Bankruptcy Code that are consistent with the report's findings.

Sec. 104. Notice of Alternatives. Section 104 of the Act amends section 342(b) of the Bankruptcy Code to require the clerk, before the commencement of a bankruptcy case by an individual whose debts are primarily consumer debts, to supply such individual with a written notice containing: (1) a brief description of chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of these chapters; (2) the types of services available from credit counseling agencies; (3) a statement advising that a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a bankruptcy case shall be subject to fine, imprisonment, or both; and (4) a statement warning that all information supplied by a debtor in connection with the case is subject to examination by the Attorney General.

Sec. 105. Debtor Financial Management Training Test Program. Section 105 of the Act requires the Director of the Executive Office for United States Trustees to: (1) consult with a wide range of debtor education experts who operate financial management education programs; and (2) develop a financial management training curriculum and materials that can be used to teach individual debtors how to manage their finances better. The Director must select six judicial districts to test the effectiveness of the financial management training curriculum and materials for an 18-month period beginning not later than 270 days after the Act's enactment date. For these six districts, the curricula and materials must be used as the instructional personal financial management course required under Bankruptcy Code section 111. Over the period of the study, the Director must evaluate the effectiveness of the curriculum and materials as well as consider a sample of existing consumer education programs (such as those described in the Report of the National Bankruptcy Review Commission) that are representative of consumer education programs sponsored by the credit industry, chapter 13 trustees, and consumer counseling groups. Not later than three months after concluding such evaluation, the Director must submit to Congress a report with findings regarding the effectiveness and cost of the curricula, materials, and programs.

Sec. 106. Credit Counseling. Section 106(a) of the Act amends section 109 of the Bankruptcy Code to require an individual – as a condition of eligibility for bankruptcy relief – to receive credit counseling within the 180-day period preceding the filing of a bankruptcy case by such individual. The credit counseling must be provided by an approved nonprofit budget and credit counseling agency consisting

of either an individual or group briefing (which may be conducted telephonically or via the Internet) that outlined opportunities for available credit counseling and assisted the individual in performing a budget analysis. This requirement does not apply to a debtor who resides in a district where the United States trustee or bankruptcy administrator has determined that approved nonprofit budget and credit counseling agencies in that district are not reasonably able to provide adequate services to such individuals. Although such determination must be reviewed annually, the United States trustee or bankruptcy administrator may disapprove a nonprofit budget and credit counseling agency at any time.

A debtor may be temporarily exempted from this requirement if he or she submits to the court a certification that: (1) describes exigent circumstances meriting a waiver of this requirement; (2) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain such services within the five-day period beginning on the date the debtor made the request; and (3) is satisfactory to the court. This exemption terminates when the debtor meets the requirements for credit counseling participation, but not longer than 30 days after the case is filed, unless the court, for cause, extends this period up to an additional 15 days.

In addition, the mandatory credit counseling requirement does not apply to a debtor whom the court determines, after notice and a hearing, is unable to complete this requirement because of incapacity, disability, or active military duty in a military combat zone. Incapacity, under this provision, means the debtor is impaired by reason of mental illness or mental deficiency so that the debtor is incapable of realizing and making rational decisions with respect to his or her financial responsibilities. Disability, under this provision, means the debtor is so physically impaired as to be unable, after reasonable effort, to receive credit counseling whether by participating in person, or via telephone or Internet briefing.

Section 106(b) of the Act amends section 727(a) of the Bankruptcy Code to deny a discharge to a chapter 7 debtor who fails to complete a personal financial management instructional course. This provision, however, does not apply if the debtor resides in a district where the United States trustee or bankruptcy administrator has determined that the approved instructional courses in that district are not adequate. Such determination must be reviewed annually by the United States trustee or bankruptcy administrator. In addition, it does not apply to a debtor whom the court determines, after notice and a hearing, is unable to complete this requirement because of incapacity, disability, or active military duty in a military combat zone.

Section 106(c) of the Act amends section 1328 of the Bankruptcy Code to deny a discharge to a chapter 13 debtor who fails to complete a personal financial management instructional course. This requirement does not apply if the debtor resides in a district where the United States trustee or bankruptcy administrator has determined that the approved instructional courses in that district are not adequate. Such determination must be reviewed annually by the United States trustee or bankruptcy administrator. In addition, it does not apply to a debtor whom the court determines, after notice and a hearing, is unable to complete this requirement because of incapacity, disability, or active military duty in a military combat zone.

Section 106(d) of the Act amends section 521 of the Bankruptcy Code to require a debtor who is an individual to file with the court: (1) a certificate from an approved nonprofit budget and credit counseling agency describing the services it provided the debtor pursuant to section 109(h); and (2) a copy of the repayment plan, if any, that was developed by the agency pursuant to section 109(h).

Section 106(e) of the Act adds section 111 to the Bankruptcy Code requiring the clerk to maintain a publically available list of approved: (1) credit counseling agencies that provide the services described in section 109(h) of the Bankruptcy Code; and (2) personal financial management instructional courses. Section 106(e) further provides that the United States trustee or bankruptcy administrator may only approve an agency or course provider under this provision pursuant to certain specified criteria. These include, for example, if a fee is charged for such services by the agency or course provider, the fee must be reasonable and such services must be provided without regard to ability to pay the fee. If such agency or provider course is approved, the approval may only be for a probationary period of up to six months. At the conclusion of the probationary period, the United States trustee or bankruptcy administrator may only approve such agency or instructional course for an additional one-year period and, thereafter for successive one-year periods, which has demonstrated during such period that it met the standards set forth in this provision and can satisfy such standards in the future.

Within 30 days after any final decision occurring after the expiration of the initial probationary period or after any subsequent two-year period, an interested person may seek judicial review of such decision in the appropriate United States district court. In addition, the district court, at any time, may investigate the qualifications of a credit counseling agency and request the production of documents to ensure the agency's integrity and effectiveness. The district court may remove a credit counseling agency that does not meet the specified qualifications from the approved list. The United States trustee or bankruptcy administrator must notify the clerk that a credit counseling agency or instructional course is no longer approved and the clerk must remove such entity from the approved list.

Section 106(e) prohibits a credit counseling agency from providing information to a credit reporting agency as to whether an individual debtor has received or sought personal financial management instruction. A credit counseling agency that willfully or negligently fails to comply with any requirement under the Bankruptcy Code with respect to a debtor shall be liable to the debtor for damages in an amount equal to: (1) actual damages sustained by the debtor as a result of the violation; and (2) any court costs or reasonable attorneys' fees incurred in an action to recover such damages.

Section 106(f) of the Act amends section 362 of the Bankruptcy Code to provide that if a chapter 7, 11, or 13 case is dismissed due to the creation of a debt repayment plan, the presumption that a case was not filed in good faith under section 362(c)(3) shall not apply to any subsequent bankruptcy case commenced by the debtor. It also provides that the court, on request of a party in interest, must issue an order under section 362(c) confirming that the automatic stay has terminated.

Sec. 107. Schedules of Reasonable and Necessary Expenses. For purposes of section 707(b) of the Bankruptcy Code, section 107 of the Act requires the Director of the Executive Office for United

States Trustees to issue schedules of reasonable and necessary administrative expenses (including reasonable attorneys' fees) relating to the administration of a chapter 13 plan for each judicial district not later than 180 days after the date of enactment of the Act.

TITLE II. ENHANCED CONSUMER PROTECTION

Subtitle A. Penalties for Abusive Creditor Practices

Sec. 201. Promotion of Alternative Dispute Resolution. Subsection (a) of section 201 of the Act amends section 502 of the Bankruptcy Code to permit the court, after a hearing on motion of the debtor, to reduce a claim based in whole on an unsecured consumer debt by up to 20 percent if: (1) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed by an approved credit counseling agency on behalf of the debtor; (2) the debtor's offer was made at least 60 days before the filing of the case; (3) the offer provided for payment of at least 60 percent of the debt over a period not exceeding the loan's repayment period or a reasonable extension thereof; and (4) no part of the debt is nondischargeable. The debtor has the burden of proving by clear and convincing evidence that: (1) the creditor unreasonably refused to consider the debtor's proposal; and (2) the proposed alternative repayment schedule was made prior to the expiration of the 60-day period. Section 201(b) amends section 547 of the Bankruptcy Code to prohibit the avoidance as a preferential transfer a payment by a debtor to a creditor pursuant to an alternative repayment plan created by an approved credit counseling agency.

Sec. 202. Effect of Discharge. Section 202 of the Act amends section 524 of the Bankruptcy Code in two respects. First, it provides that the willful failure of a creditor to credit payments received under a confirmed chapter 11, 12, or 13 plan constitutes a violation of the discharge injunction if the creditor's action to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor. This provision does not apply if the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner prescribed by the plan. Second, section 202 amends section 524 of the Bankruptcy Code to provide that the discharge injunction does not apply to a creditor having a claim secured by an interest in real property that is the debtor's principal residence if the creditor communicates with the debtor in the ordinary course of business between the creditor and the debtor and such communication is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of the pursuit of *in rem* relief to enforce the lien.

Sec. 203. Discouraging Abuse of Reaffirmation Agreement Practices. Section 203 of the Act effectuates a comprehensive overhaul of the law applicable to reaffirmation agreements. Subsection (a) amends section 524 of the Bankruptcy Code to mandate that certain specified disclosures be provided to a debtor at or before the time he or she signs a reaffirmation agreement. These specified disclosures, which are the only disclosures required in connection with a reaffirmation agreement, must be in writing and be made clearly and conspicuously. In addition, the disclosure must include certain advisories and explanations. At the election of the creditor, the disclosure statement may include a

repayment schedule. If the debtor is represented by counsel, section 203(a) mandates that the attorney file a certification stating that the agreement represents a fully informed and voluntary agreement by the debtor, that the agreement does not impose an undue hardship on the debtor or any dependent of the debtor, and that the attorney fully advised the debtor of the legal effect and consequences of such agreement as well as of any default thereunder. In those instances where the presumption of undue hardship applies, the attorney must also certify that the debtor is able to make the payments required under the reaffirmation agreement. Further, the debtor must submit a statement setting forth the debtor's monthly income and actual current monthly expenditures. If the debtor is represented by counsel and the debt being reaffirmed is owed to a credit union, a modified version of this statement may be used.

Notwithstanding any other provision of the Bankruptcy Code, section 203(a) permits a creditor to accept payments from a debtor: (1) before and after the filing of a reaffirmation agreement with the court; or (2) pursuant to a reaffirmation agreement that the creditor believes in good faith to be effective. It further provides that the requirements specified in subsections (c)(2) and (k) of section 524 are satisfied if the disclosures required by these provisions are given in good faith.

Where the amount of the scheduled payments due on the reaffirmed debt (as disclosed in the debtor's statement) exceeds the debtor's available income, it is presumed for 60 days from the date on which the reaffirmation agreement is filed with the court that the agreement presents an undue hardship. The court must review such presumption, which can be rebutted by the debtor by a written statement explaining the additional sources of funds that would enable the debtor to make the required payments on the reaffirmed debt. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove the reaffirmation agreement. No reaffirmation agreement may be disapproved without notice and hearing to the debtor and creditor. The hearing must be concluded before the entry of the debtor's discharge. The requirements set forth in this paragraph do not apply to reaffirmation agreements if the creditor is a credit union.

Section 203(b) amends title 18 of the United States Code to require the Attorney General to designate a United States Attorney for each judicial district and to appoint a Federal Bureau of Investigation agent for each field office to have primary law enforcement responsibilities for violations of sections 152 and 157 of title 18 with respect to abusive reaffirmation agreements and materially fraudulent statements in bankruptcy schedules that are intentionally false or misleading. In addition, section 203(b) provides that the designated United States Attorney has primary responsibility with respect to bankruptcy investigations under section 3057 of title 18. Section 203(b) further provides that the bankruptcy courts must establish procedures for referring any case in which a materially fraudulent bankruptcy schedule has been filed.

Sec. 204. Preservation of Claims and Defenses Upon Sale of Predatory Loans. Section 204 of the Act adds a provision to section 363 of the Bankruptcy Code with respect to sales of any interest in a consumer transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations). It provides that the purchaser of such interest remains subject to all claims and defenses that are related to such assets

to the same extent as that person would be subject to if the sale was not conducted under section 363.

Sec. 205. GAO Study and Report on Reaffirmation Agreement Process. Section 205 of the Act directs the Comptroller General of the United States to report to Congress on how consumers are treated in connection with the reaffirmation agreement process. This report must include: (1) the policies and activities of creditors with respect to reaffirmation agreements; and (2) whether such consumers are fully, fairly, and consistently informed of their rights under the Bankruptcy Code. The report, which must be completed not later than 18 months after the date of enactment of this Act, may include recommendations for legislation to address any abusive or coercive tactics found in connection with the reaffirmation process.

SUBTITLE B. PRIORITY CHILD SUPPORT

Sec. 211. Definition of Domestic Support Obligation. Section 211 of the Act amends section 101 of the Bankruptcy Code to define a domestic support obligation as a debt that accrues before, on**,** or after the date of the order for relief and that it includes interest that accrues pursuant to applicable nonbankruptcy law. As defined in the Act, the term includes a debt owed to or recoverable by: (1) a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative; or (2) a governmental unit. To qualify as a domestic support obligation, the debt must be in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit), without regard to whether such debt is expressly so designated. It must be established or subject to establishment before, on, or after the date of the order of relief pursuant to: (1) a separation agreement, divorce decree, or property settlement agreement; (2) an order of a court of record; or (3) a determination made in accordance with applicable nonbankruptcy law by a governmental unit. It does not apply to a debt assigned to a nongovernmental entity, unless it was assigned voluntarily by the spouse, former spouse, child, or parent solely for the purpose of collecting the debt.

Sec. 212. Priorities for Claims for Domestic Support Obligations. Section 212 of the Act amends section 507(a) of the Bankruptcy Code to accord first priority in payment to allowed unsecured claims for domestic support obligations that, as of the petition date, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or the parent, legal guardian, or responsible relative of such child, without regard to whether such claim is filed by the claimant or by a governmental unit on behalf of such claimant, on the condition that funds received by such unit under this provision be applied and distributed in accordance with nonbankruptcy law. Subject to these claims, section 212 accords the same payment priority to allowed unsecured claims for domestic support obligations that, as of the petition date, were assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless the claimant assigned the claim voluntarily for the purpose of collecting the debt), or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received by such unit under this provision be applied and distributed in accordance with nonbankruptcy law. Where a trustee administers assets that may be available for payment of domestic support obligations under section 507(a)(1) (as amended), administrative expenses of the trustee allowed under section

503(b)(1)(A), (2) and (6) of the Bankruptcy Code must be paid before such claims to the extent the trustee administers assets that are otherwise available for the payment of these claims.

Sec. 213. Requirements To Obtain Confirmation and Discharge in Cases Involving Domestic Support Obligations. With respect to chapter 11 cases, section 213(1) adds a condition for confirmation of a plan. It amends section 1129(a) of the Bankruptcy Code to provide that if a chapter 11 debtor is required by judicial or administrative order or statute to pay a domestic support obligation, then the debtor must pay all amounts payable under such order or statute that became payable postpetition as a prerequisite for confirmation.

With respect to chapter 12 cases, section 213(2) of the Act amends section 1208(c) of the Bankruptcy Code to provide that the failure of a debtor to pay any domestic support obligation that first becomes payable postpetition is cause for conversion or dismissal of the case. Section 213(3) amends Bankruptcy Code section 1222(a) to permit a chapter 12 debtor to propose a plan paying less than full payment of all amounts owed for a claim entitled to priority under Bankruptcy Code section 507(a)(1)(B) if all of the debtor's projected disposable income for a five-year period is applied to make payments under the plan. Section 213(4) of the Act amends Bankruptcy Code section 1222(b) to permit a chapter 12 debtor to propose a plan that pays postpetition interest on claims that are nondischargeable under Section 1228(a), but only to the extent that the debtor has disposable income available to pay such interest after payment of all allowed claims in full. Section 213(5) amends Bankruptcy Code section 1225(a) to provide that if a chapter 12 debtor is required by judicial or administrative order or statute to pay a domestic support obligation, then the debtor must pay such obligations pursuant to such order or statute that became payable postpetition as a condition of confirmation. Section 213(6) amends section Bankruptcy Code section 1228(a) to condition the granting of a chapter 12 discharge upon the debtor's payment of certain postpetition domestic support obligations.

With respect to chapter 13 cases, section 213(7) of the Act amends Bankruptcy Code section 1307(c) to provide that the failure of a debtor to pay any domestic support obligation that first becomes payable postpetition is cause for conversion or dismissal of the debtor's case. Section 213(8) amends Bankruptcy Code section 1322(a) to permit a chapter 13 debtor to propose a plan paying less than the full amount of a claim entitled to priority under Bankruptcy Code section 507(a)(1)(B) if the plan provides that all of the debtor's projected disposable income over a five-year period will be applied to make payments under the plan. Section 213(9) amends Bankruptcy Code section 1322(b) to permit a chapter 13 debtor to propose a plan that pays postpetition interest on nondischargeable debts under section 1328(a), but only to the extent that the debtor has disposable income available to pay such interest after payment in full of all allowed claims. Section 213(10) amends Bankruptcy Code section 1325(a) to provide that if a chapter 13 debtor is required by judicial or administrative order or statute to pay a domestic support obligation, then the debtor must pay all such obligations pursuant to such order or statute that became payable postpetition as a condition of confirmation. Section 213(11) amends Bankruptcy Code section 1328(a) to condition the granting of a chapter 13 discharge on the debtor's payment of certain postpetition domestic support obligations.

Sec. 214. Exceptions To Automatic Stay in Domestic Support Proceedings. Under current law, section 362(b)(2) of the Bankruptcy Code excepts from the automatic stay the commencement or continuation of an action or proceeding: (1) for the establishment of paternity; or (2) the establishment or modification of an order for alimony, maintenance or support. It also permits the collection of such obligations from property that is not property of the estate. Section 214 makes several revisions to Bankruptcy Code section 362(b)(2). First, it replaces the reference to "alimony, maintenance or support"with "domestic support obligations." Second, it adds to section 362(b)(2) actions or proceedings concerning: (1) child custody or visitation; (2) the dissolution of a marriage (except to the extent such proceeding seeks division of property that is property of the estate); and (3) domestic violence. Third, it permits the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order as well as the withholding, suspension, or restriction of a driver's license, or a professional, occupational or recreational license under state law, pursuant to section 466(a)(16) of the Social Security Act. Fourth, it authorizes the reporting of overdue support owed by a parent to any consumer reporting agency pursuant to section 466(a)(7) of the Social Security Act. Fifth, it permits the interception of tax refunds as authorized by sections 464 and 466(a)(3) of the Social Security Act or analogous state law. Sixth, it allows medical obligations, as specified under title IV of the Social Security Act, to be enforced notwithstanding the automatic stay.

Sec. 215. Nondischargeability of Certain Debts for Alimony, Maintenance, and Support. Section 215 of the Act amends Bankruptcy Code section 523(a)(5) to provide that a "domestic support obligation" (as defined in section 211 of the Act) is nondischargeable and eliminates Bankruptcy Code section 523(a)(18). Section 215(2) amends Bankruptcy Code section 523(c) to delete the reference to section 523(a)(15) in that provision. Section 215(3) amends section 523(a)(15) to provide that obligations to a spouse, former spouse, or a child of the debtor (not otherwise described in section 523(a)(5)) incurred in connection with a divorce or separation or related action are nondischargeable irrespective of the debtor's inability to pay such debts.

Sec. 216. Continued Liability of Property. Section 216(1) of the Act amends section 522(c) of the Bankruptcy Code to make exempt property liable for nondischargeable domestic support obligations notwithstanding any contrary provision of applicable nonbankruptcy law. Section 216(2) and (3) make conforming amendments to sections 522(f)(1)(A) and 522(g)(2) of the Bankruptcy Code.

Sec. 217. Protection of Domestic Support Claims Against Preferential Transfer Motions. Section 217 of the Act makes a conforming amendment to Bankruptcy Code section 547(c)(7) to provide that a bona fide payment of a debt for a domestic support obligation may not be avoided as a preferential transfer.

Sec. 218. Disposable Income Defined. Section 218 of the Act amends section 1225(b)(2)(A) of the Bankruptcy Code to provide that disposable income in a chapter 12 case does not include payments for postpetition domestic support obligations.

Sec. 219. Collection of Child Support. Section 219 amends sections 704, 1106, 1202, and 1302 of

the Bankruptcy Code to require trustees in chapter 7, 11, 12, and 13 cases to provide certain notices to child support claimants and governmental enforcement agencies. In addition, the Act conforms internal statutory cross references to Bankruptcy Code section 523(a)(14A) and deletes the reference to Bankruptcy Code section 523(a)(14) with respect to chapter 13, as this provision is inapplicable to that chapter.

Section 219(a) requires a chapter 7 trustee to provide written notice to a domestic support claimant of the right to use the services of a state child support enforcement agency established under sections 464 and 466 of the Social Security Act in the state where the claimant resides for assistance in collecting child support during and after the bankruptcy case. The notice must include the agency's address and telephone number as well as explain the claimant's right to payment under the applicable chapter of the Bankruptcy Code. In addition, the trustee must provide written notice to the claimant and the agency of such claim and include the name, address, and telephone number of the child support claimant. At the time the debtor is granted a discharge, the trustee must notify both the child support claimant and the agency that the debtor was granted a discharge as well as supply them with the debtor's last known address, the last known name and address of the debtor's employer, and the name of each creditor holding a debt that is not discharged under section 523(a)(2), (4) or (14A) or holding a debt that was reaffirmed pursuant to Bankruptcy Code section 524. A claimant or agency may request the debtor's last known address from a creditor holding a debt that is not discharged under section 523(a)(2), (4) or (14A) or that is reaffirmed pursuant to section 524 of the Bankruptcy Code. A creditor who discloses such information, however, is not liable to the debtor or any other person by reason of such disclosure. Subsections (b), (c), and (d) of section 219 of the Act impose comparable requirements for chapter 11, 12, and 13 trustees.

Sec. 220. Nondischargeability of Certain Educational Benefits and Loans. Section 220 of the Act amends section 523(a)(8) of the Bankruptcy Code to provide that a debt for a qualified education loan (as defined in section 221(e)(1) of the Internal Revenue Code) is nondischargeable, unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents.

Subtitle C. Other Consumer Protections

Sec. 221. Amendments To Discourage Abusive Bankruptcy Filings. Section 221 of the Act makes a series of amendments to section 110 of the Bankruptcy Code. First, section 221 clarifies that the definition of a bankruptcy petition preparer does not include an attorney for a debtor or an employee of an attorney under the direct supervision of such attorney. Second, it amends subsections (b) and (c) of section 110 to provide that if a bankruptcy petition preparer is not an individual, then an officer, principal, responsible person, or partner of the preparer must sign certain documents filed in connection with the bankruptcy case as well as state the person's name and address on such documents. Third, it requires a bankruptcy petition preparer to give the debtor written notice (as prescribed by the Judicial Conference of the United States) explaining that the preparer is not an attorney and may not practice law or give legal advice. The notice may include examples of legal advice that a preparer may not provide. Such notice must be signed by the preparer under penalty of perjury and the debtor and be filed with any document for filing. Fourth, the petition preparer is prohibited from giving legal advice,

including with respect to certain specified items. Fifth, it permits the Supreme Court to promulgate rules or the Judicial Conference of the United States to issue guidelines for setting the maximum fees that a bankruptcy petition preparer may charge for services. Sixth, section 221 requires the preparer to notify the debtor of such maximum fees. Seventh, it specifies that the bankruptcy petition preparer must certify that it complied with this notification requirement. Eighth, it requires the court to order the turnover of any fees in excess of the value of the services rendered by the preparer within the 12-month period preceding the bankruptcy filing. Ninth, section 221 provides that all fees charged by a preparer may be forfeited if the preparer fails to comply with certain requirements specified in Bankruptcy Code section 110, as amended by this provision. Tenth, it allows a debtor to exempt fees recovered under this provision pursuant to Bankruptcy Code section 522(b). Eleventh, it specifically authorizes the court to enjoin a bankruptcy petition preparer who has violated a court order issued under section 110. Twelfth, it generally revises section 110's penalty provisions and requires such penalties to be paid into a special fund of the United States trustee for the purpose of funding the enforcement of section 110 on a national basis. With respect to Bankruptcy Administrator districts, the funds are to be deposited as offsetting receipts pursuant to section 1931 of title 28 of the United States Code.

Sec. 222. Sense of Congress. Section 222 of the Act expresses the sense of Congress that the states should develop personal finance curricula for use in elementary and secondary schools.

Sec. 223. Additional Amendments to Title 11, United States Code. Section 223 of the Act amends section 507(a) of the Bankruptcy Code to accord a tenth-level priority to claims for death or personal injuries resulting from the debtor's operation of a motor vehicle or vessel while intoxicated.

Sec. 224. Protection of Retirement Savings in Bankruptcy. The intent of section 224 is to expand the protection for tax-favored retirement plans or arrangements that may not be already protected under Bankruptcy Code section 541(c)(2) pursuant to Patterson v. Shumate,[1] or other state or federal law. Subsection (a) of section 224 of the Act amends section 522 of the Bankruptcy Code to permit a debtor to exempt certain retirement funds to the extent those monies are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code and that have received a favorable determination pursuant to Internal Revenue Code section 7805 that is in effect as of the date of the commencement of the case. If the retirement monies are in a retirement fund that has not received a favorable determination, those monies are exempt if the debtor demonstrates that no prior unfavorable determination has been made by a court or the Internal Revenue Service, and the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code. If the retirement fund fails to be in substantial compliance with applicable requirements of the Internal Revenue Code, the debtor may claim the retirement funds as exempt if he or she is not materially responsible for such failure. This section also applies to certain direct transfers and rollover distributions. In addition, this provision ensures that the specified retirement funds are exempt under state as well as federal law.

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[1] 504 U.S. 753 (1992).

Section 224(b) amends section 362(b) of the Bankruptcy Code to except from the automatic stay the withholding of income from a debtor's wages pursuant to an agreement authorizing such withholding for the benefit of a pension, profit-sharing, stock bonus, or other employer-sponsored plan established under Internal Revenue Code section 401, 403, 408, 408A, 414, 457, or 501(c) to the extent that the amounts withheld are used solely to repay a loan from a plan as authorized by section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or subject to Internal Revenue Code section 72(p) or with respect to a loan from certain thrift savings plans. Section 224(b) further provides that this exception may not be used to cause any loan made under a governmental plan under section 414(d) or a contract or account under section 403(b) of the Internal Revenue Code to be construed to be a claim or debt within the meaning of the Bankruptcy Code.

Section 224(c) amends Bankruptcy Code section 523(a) to except from discharge any amount owed by the debtor to a pension, profit-sharing, stock bonus, or other plan established under Internal Revenue Code section 401, 403, 408, 408A, 414, 457, or 501(c) under a loan authorized under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or subject to Internal Revenue Code section 72(p) or with respect to a loan from certain thrift savings plans. Section 224(c) further provides that this exception to discharge may not be used to cause any loan made under a governmental plan under section 414(d) or a contract or account under section 403(b) of the Internal Revenue Code to be construed to be a claim or debt within the meaning of the Bankruptcy Code.

Section 224(d) amends Bankruptcy Code section 1322 to provide that a chapter 13 plan may not materially alter the terms of a loan described in section 362(b)(19) and that any amounts required to repay such loan shall not constitute “disposable income” under section 1325 of the Bankruptcy Code.

Section 224(e) amends section 522 of the Bankruptcy Code to impose a $1 million cap (periodically adjusted pursuant to section 104 of the Bankruptcy Code to reflect changes in the Consumer Price Index) on the value of the debtor’s interest in an individual retirement account established under either section 408 or 408A of the Internal Revenue Code (other than a simplified employee pension account under section 408(k) or a simple retirement account under section 408(p) of the Internal Revenue Code) that a debtor may claim as exempt property. This limit applies without regard to amounts attributable to rollover contributions made pursuant to section 402(c), 402(e)(6), 403(a)(4), 403(a)(5), or 403(b)(8) of the Internal Revenue Code and earnings thereon. The cap may be increased if required in the interests of justice.

Sec. 225. Protection of Education Savings in Bankruptcy. Subsection (a) of section 225 of the Act amends section 541 of the Bankruptcy Code to provide that funds placed not later than 365 days before the filing of the bankruptcy case in a education individual retirement account are not property of the estate if certain criteria are met. First, the designated beneficiary of such account must be a child, stepchild, grandchild or step-grandchild of the debtor for the taxable year during which funds were placed in the account. A legally adopted child or a foster child, under certain circumstances, may also qualify as a designated beneficiary. Second, such funds may not be pledged or promised to an entity in connection with any extension of credit and they may not be excess contributions (as described in section 4973(e) of the Internal Revenue Code). Funds deposited between 720 days and 365 days

before the filing date are protected to the extent they do not exceed $5,000. Similar criteria apply with respect to funds used to purchase a tuition credit or certificate or to funds contributed to a qualified state tuition plan under section 529(b)(1)(A) of the Internal Revenue Code. Section 225(b) amends Bankruptcy Code section 521 to require a debtor to file with the court a record of any interest that the debtor has in an education individual retirement account or qualified state tuition program.

Sec. 226. Definitions. Subsection (a) of section 226 of the Act amends section 101 of the Bankruptcy Code to add certain definitions with respect to debt relief agencies. Section 226(a)(1) defines an "assisted person" as a person whose debts consist primarily of consumer debts and whose nonexempt assets are less than $150,000. Section 226(a)(2) defines "bankruptcy assistance" as any goods or services sold or otherwise provided with the express or implied purpose of giving information, advice, or counsel; preparing documents for filing; or attending a meeting of creditors pursuant to section 341; appearing in a case or proceeding on behalf of a person; or providing legal representation in a case or proceeding under the Bankruptcy Code. Section 226(a)(3) defines a "debt relief agency" as any person (including a bankruptcy petition preparer) who provides bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration. The definition specifically excludes certain entities. First, it does not apply to a nonprofit organization exemption from taxation under section 501(c)(3) of the Internal Revenue Code. Second, it is inapplicable to a creditor who assisted such person to the extent the assistance pertained to the restructuring of any debt owed by the person to the creditor. Third, the definition does not apply to a depository institution (as defined in section 3 of the Federal Deposit Insurance Act), or any federal or state credit union (as defined in section 101 of the Federal Credit Union Act), as well as any affiliate or subsidiary of such depository institution or credit union. Fourth, an author, publisher, distributor, or seller of works subject to copyright protection under title 17 of the United States Code when acting in such capacity is not within the ambit of this definition.

Section 226(b) amends section 104(B)(1) of the Bankruptcy Code to permit the monetary amount set forth in the definition of an "assisted person" to be automatically adjusted to reflect the change in the Consumer Price Index.

Sec. 227. Restrictions on Debt Relief Agencies. Section 227 of the Act creates a new provision in the Bankruptcy Code intended to proscribe certain activities of a debt relief agency. It prohibits such agency from: (1) failing to perform any service that it informed an assisted person it would provide; (2) advising an assisted person to make an untrue and misleading statement (or that upon the exercise of reasonable case, should have been known to be untrue or misleading) in a document filed in a bankruptcy case; (3) misrepresenting the services it provides and the benefits that an assisted person may receive as a result of bankruptcy; and (4) advising an assisted person or prospective assisted person to incur additional debt in contemplation of filing for bankruptcy relief or for the purpose of paying fees for services rendered by an attorney or petition preparer in connection with the bankruptcy case. Any waiver by an assisted person of the protections under this provision are unenforceable, except against a debt relief agency.

In addition, section 227 imposes penalties for the violation of section 526, 527 or 528 of the

Bankruptcy Code. First, any contract between a debt relief agency and an assisted person that does not comply with these provisions is void and may not be enforced by any state or federal court or by any person, except an assisted person. Second, a debt relief agency is liable to an assisted person, under certain circumstances, for any fees or charges paid by such person to the agency, actual damages, and reasonable attorneys' fees and costs. The chief law enforcement officer of a state who has reason to believe that a person has violated or is violating section 526 may seek to have such violation enjoined and recover actual damages. Third, section 227 provides that the United States district court has concurrent jurisdiction of certain actions under section 526. Fourth, section 227 provides that sections 526, 527 and 528 preempt inconsistent state law. In addition, it provides that these provisions do not limit or curtail the authority of a federal court, a state, or a subdivision or instrumentality of a state, to determine and enforce qualifications for the practice of law before the federal court or under the laws of that state.

Sec. 228. Disclosures. Section 228 of the Act requires a debt relief agency to provide certain specified written notices to an assisted person. These include the notice required under section 342(b)(1) (as amended by this Act) as well as a notice advising that: (1) all information the assisted person provides in connection with the case must be complete, accurate and truthful; (2) all assets and liabilities must be completely and accurately disclosed in the documents filed to commence the case, including the replacement value of each asset (if required) after reasonable inquiry to establish such value; (3) current monthly income, monthly expenses and, in a chapter 13 case, disposable income, must be stated after reasonable inquiry; and (4) the information an assisted person provides may be audited and that the failure to provide such information may result in dismissal of the case or other sanction including, in some instances, criminal sanctions. In addition, the agency must supply certain specified advisories and explanations regarding the bankruptcy process. Further, this provision requires the agency to advise an assisted person (to the extent permitted under nonbankruptcy law) concerning asset valuation, the calculation of disposable income, and the determination of exempt property.

Sec. 229. Requirements for Debt Relief Agencies. Section 229 adds a provision to the Bankruptcy Code requiring a debt relief agency -- not later than five business days after the first date on which it provides any bankruptcy assistance services to an assisted person (but prior to such assisted person's bankruptcy petition being filed) -- to execute a written contract with the assisted person. The contract must specify clearly and conspicuously the services the agency will provide, the basis on which fees will be charged for such services, and the terms of payment. The assisted person must be given a copy of the fully executed and completed contract in a form the person can retain. The debt relief agency must include certain specified mandatory statements in any advertisement of bankruptcy assistance services or regarding the benefits of bankruptcy that is directed to the general public whether through the general media, seminars, specific mailings, telephonic or electronic messages, or otherwise.

Sec. 230. GAO Study. Section 230 of the Act directs the Comptroller General of the United States to study and prepare a report on the feasibility, efficacy and cost of requiring trustees to supply certain specified information about a debtor's bankruptcy case to the Office of Child Support Enforcement for the purpose of determining whether a debtor has outstanding child support obligations.

Sec. 231. Protection of Personally Identifiable Information. Section 231 of the Act clarifies that it applies to personally identifiable information and does not preempt applicable nonbankruptcy law. In addition, the provision specifies that court approval must be preceded by the appointment of a privacy ombudsman to effectuate the intent of this provision.

Subsection (a) amends Bankruptcy Code section 363(b)(1) to provide that if a debtor, in connection with offering a product or service, discloses to an individual a policy prohibiting the transfer of personally identifiable information to persons unaffiliated with the debtor, and the policy is in effect at the time of the bankruptcy filing, then the trustee may not sell or lease such information unless either of the following conditions is satisfied: (1) the sale is consistent with such policy; or (2) the court, after appointment of a consumer privacy ombudsman (pursuant to section 332 of the Bankruptcy Code, as amended) and notice and hearing, the court approves the sale or lease upon due consideration of the facts, circumstances, and conditions of the sale or lease.

Section 231(b) amends Bankruptcy Code section 101 to add a definition of "personally identifiable information." The term applies to information provided by an individual to the debtor in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes. It includes the individual's: (1) first name or initial and last name (whether given at birth or adoption or legally changed); (2) physical home address; (3) electronic address, including an e-mail address; (4) home telephone number; (5) Social Security account number; or (vi) credit card account number. The term also includes information if it is identified in connection with the above items: (1) an individual's birth date, birth or adoption certificate number, or place of birth; or (2) any other information concerning an identified individual that, if disclosed, will result in the physical or electronic contacting or identification of that person.

Sec. 232. Consumer Privacy Ombudsman. Section 232 implements the preceding provision of the Act with respect to the appointment and responsibilities of a consumer privacy ombudsman. It provides that if a hearing is required under section 363(b)(1)(B) (as amended), the court must order the United States trustee to appoint a disinterested person to serve as the consumer privacy ombudsman and to provide timely notice of the hearing to such person. It permits the ombudsman to appear and be heard at such hearing. The ombudsman must provide the court with information to assist its consideration of the facts, circumstances and conditions of the proposed sale or lease of personally identifiable information. The information may include a presentation of the debtor's privacy policy, potential losses or gains of privacy to consumers if the sale or lease is approved, potential costs or benefits to consumers if the sale or lease is approved, and possible alternatives that would mitigate potential privacy losses or costs to consumers. Section 232 prohibits the ombudsman from disclosing any personally identifiable information obtained in the case by such individual. In addition, the provision amends Bankruptcy Code section 330(a)(1) to permit an ombudsman to be compensated.

Sec. 233. Prohibition on Disclosure of Name of Minor Children. Section 233 of the Act adds a new provision to the Bankruptcy Code (section 112) specifying that a debtor may be required to provide information regarding his or her minor child in connection with the bankruptcy case, but such debtor may not be required to disclose in the public records the child's name. It provides, however, that the

debtor may be required to disclose this information in a nonpublic record maintained by the court, which must be available for inspection by the United States trustee, trustee or an auditor, if any. Section 233 prohibits the court, United States trustee, trustee, or auditor from disclosing such minor child's name. Section 233 clarifies that the prohibition against disclosure pertains to the minor child's name.

Sec. 234. Protection of Personal Information. Bankruptcy Code section 107, with certain exceptions, provides that all papers filed in a bankruptcy case are public records. Exceptions include trade secrets, confidential research, and scandalous or defamatory matter. Section 234(a) adds a new provision to section 107 that permits a bankruptcy court to prohibit the disclosure of certain types of information concerning an individual to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property. The protected information includes any means of identification as defined in 18 U.S.C. § 1028(d) that is contained in a document filed in a bankruptcy case. The bankruptcy court must provide access to information protected under this new provision to an entity acting pursuant to the police or regulatory power of a domestic governmental unit upon ex parte application demonstrating cause. The provision also provides that the United States trustee, bankruptcy administrator, trustee, and any auditor serving pursuant to section 586(f) of title 28 of the United States Code shall have access to all information contained in a bankruptcy case and that such persons shall not disclose information specifically protected by the court. Section 234(b) amends Bankruptcy Code section 342(c), which requires a debtor to disclose in any notice required by the debtor to be given to a creditor to include the debtor's taxpayer identification number. Section 234(b) requires the debtor only to supply the last four digits of the taxpayer identification number. If, however, the notice concerns an amendment that adds a creditor to the schedules of assets or liabilities, the debtor must include the full taxpayer identification number in the notice sent to such creditor. The notice filed with the court must only include the last four digits of such notice.

TITLE III. DISCOURAGING BANKRUPTCY ABUSE

Sec. 301. Technical Amendments. Section 301 of the Act makes a clarifying amendment to section 523(a)(17) of the Bankruptcy Code concerning the dischargeability of court fees incurred by prisoners. Section 523(a)(17) was added to the Bankruptcy Code by the Omnibus Consolidated Rescissions and Appropriations Act of 1996[2] to except from discharge the filing fees and related costs and expenses assessed by a court in a civil case or appeal. As the result of a drafting error, however, this provision might be construed to apply to filing fees, costs or expenses incurred by any debtor, not solely by those who are prisoners. The amendment eliminates this ambiguity and makes other conforming changes to narrow its application in accordance with its original intent.

Sec. 302. Discouraging Bad Faith Repeat Filings. Section 302 of the Act amends section 362(c) of

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[2] PUB. L. NO. 104-134, § 804(b) (1996).

the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period. The provision does not apply to a case refiled under a chapter other than chapter 7 after dismissal of the prior chapter 7 case pursuant to section 707(b) of the Bankruptcy Code. Upon motion of a party in interest, the court may continue the automatic stay after notice and a hearing completed prior to the expiration of the 30-day period if such party demonstrates that the latter case was filed in good faith as to the creditors who are stayed by the filing.

For purposes of this provision, a case is presumptively not filed in good faith as to all creditors (but such presumption may be rebutted by clear and convincing evidence) if: (1) more than one bankruptcy case under chapter 7, 11 or 13 was previously filed by the debtor within the preceding one-year period; (2) the prior chapter 7, 11, or 13 case was dismissed within the preceding year for the debtor's failure to (a) file or amend without substantial excuse a document required under the Bankruptcy Code or the court, (b) provide adequate protection ordered by the court, or (c) perform the terms of a confirmed plan; or (3) there has been no substantial change in the debtor's financial or personal affairs since the dismissal of the prior case, or there is no reason to conclude that the pending case will conclude either with a discharge (if a chapter 7 case) or confirmation (if a chapter 11 or 13 case). In addition, section 302 provides that a case is presumptively deemed not to be filed in good faith as to any creditor who obtained relief from the automatic stay in the prior case or sought such relief in the prior case and such action was pending at the time of the prior case's dismissal. The presumption may be rebutted by clear and convincing evidence. A similar presumption applies if two or more bankruptcy cases were pending in the one-year preceding the filing of the pending case.

Sec. 303. Curbing Abusive Filings. Section 303 of the Act is intended to reduce abusive filings. Subsection (a) amends Bankruptcy Code section 362(d) to add a new ground for relief from the automatic stay. Under this provision, cause for relief from the automatic stay may be established for a creditor whose claim is secured by an interest in real property, if the court finds that the filing of the bankruptcy case was part of a scheme to delay, hinder and defraud creditors that involved either: (1) a transfer of all or part of an ownership interest in real property without such creditor's consent or without court approval; or (2) multiple bankruptcy filings affecting the real property. If recorded in compliance with applicable state law governing notice of an interest in or a lien on real property, an order entered under this provision is binding in any other bankruptcy case for two years from the date of entry of such order. A debtor in a subsequent case may move for relief based upon changed circumstances or for good cause shown after notice and a hearing. Section 303(a) further provides that any federal, state or local governmental unit that accepts a notice of interest or a lien in real property, must accept a certified copy of an order entered under this provision.

Section 303(b) amends Bankruptcy Code section 362(b) to except from the automatic stay an act to enforce any lien against or security interest in real property within two years following the entry of an order entered under section 362(d)(4). A debtor, in a subsequent case, may move for relief from such order based upon changed circumstances or for other good cause shown after notice and a hearing. Section 303(b) also provides that the automatic stay does not apply in a case where the debtor: (1) is ineligible to be a debtor in a bankruptcy case pursuant to section 109(g) of the

Bankruptcy Code; or (2) filed the bankruptcy case in violation of an order issued in a prior bankruptcy case prohibiting the debtor from being a debtor in a subsequent bankruptcy case.

Sec. 304. Debtor Retention of Personal Property Security. Section 304(1) of the Act amends section 521(a) of the Bankruptcy Code to provide that an individual who is a chapter 7 debtor may not retain possession of personal property securing, in whole or in part, a purchase money security interest unless the debtor, within 45 days after the first meeting of creditors, enters into a reaffirmation agreement with the creditor, or redeems the property. If the debtor fails to so act within the prescribed period, the property is not subject to the automatic stay and is no longer property of the estate. An exception applies if the court: (1) determines on motion of the trustee filed before the expiration of the 45-day period that the property has consequential value or would benefit the bankruptcy estate; (2) orders adequate protection of the creditor's interest; and (iii) directs the debtor to deliver any collateral in the debtor's possession. Section 304(2) amends section 722 to clarify that a chapter 7 debtor must pay the redemption value in full at the time of redemption.

Sec. 305. Relief from the Automatic Stay When the Debtor Does Not Complete Intended Surrender of Consumer Debt Collateral. Paragraph (1) of section 305 of the Act amends Bankruptcy Code section 362 to terminate the automatic stay with respect to personal property of the estate or of the debtor in a chapter 7, 11, or 13 case (where the debtor is an individual) that secures a claim (in whole or in part) or is subject to an unexpired lease if the debtor fails to: (1) file timely a statement of intention as required by section 521(a)(2) of the Bankruptcy Code with respect to such property; or (2) indicate in such statement whether the property will be surrendered or retained, and if retained, whether the debtor will redeem the property or reaffirm the debt, or assume an unexpired lease, if the trustee does not. Likewise, the automatic stay is terminated if the debtor fails to take the action specified in the statement of intention in a timely manner, unless the statement specifies reaffirmation and the creditor refuses to enter into the reaffirmation agreement on the original contract terms. In addition to terminating the automatic stay, this provision renders such property no longer property of the estate An exception pertains where the court determines, on the motion of the trustee made prior to the expiration of the applicable time period under section 521(a)(2), and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders adequate protection of the creditor's interest, and directs the debtor to deliver any collateral in the debtor's possession.

Section 305(2) amends section 521 of the Bankruptcy Code to make the requirement to file a statement of intention applicable to all secured debts, not just secured consumer debts. In addition, it requires the debtor to effectuate his or her stated intention within 30 days from the first date set for the meeting of creditors. If the debtor fails to timely undertake certain specified actions with respect to property that a lessor or bailor owns and has leased, rented or bailed to the debtor or in which a creditor has a security interest (not otherwise avoidable under section 522(f), 544, 545, 547, 548 or 549 of the Bankruptcy Code), then nothing in the Bankruptcy Code shall prevent or limit the operation of a provision in a lease or agreement that places the debtor in default by reason of the debtor's bankruptcy or insolvency.

Sec. 306. Giving Secured Creditors Fair Treatment in Chapter 13. Subsection (a) of section 306 of

the Act amends Bankruptcy Code section 1325(a)(5)(B)(i) to require – as a condition of confirmation – that a chapter 13 plan provide that a secured creditor retain its lien until the earlier of when the underlying debt is paid or the debtor receives a discharge. If the case is dismissed or converted prior to completion of the plan, the secured creditor is entitled to retain its lien to the extent recognized under applicable nonbankruptcy law.

Section 306(b) adds a new paragraph to section 1325(a) of the Bankruptcy Code specifying that Bankruptcy Code section 506 does not apply to a debt incurred within the two and one-half year period preceding the filing of the bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor. Where the collateral consists of any other type of property having value, section 306(b) provides that section 506 of the Bankruptcy Code does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case.

Section 306(c)(1) amends section 101 of the Bankruptcy Code to define the term "debtor's principal residence" as a residential structure (including incidental property) without regard to whether or not such structure is attached to real property. The term includes an individual condominium or cooperative unit as well as a mobile or manufactured home, and a trailer.

Section 306(c)(2) amends section 101 of the Bankruptcy Code to define the term "incidental property" as property commonly conveyed with a principal residence in the area where the real property is located. The term includes all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, and insurance proceeds. Further, the term encompasses all replacements and additions.

Sec. 307. Domiciliary Requirements for Exemptions. Section 307 of the Act amends section 522(b)(2)(A) of the Bankruptcy Code to extend the time that a debtor must be domiciled in a state from 180 days to 730 days before he or she may claim that state's exemptions. If the debtor's domicile has not been located in a single state for the 730-day period, then the state where the debtor was domiciled in the 180-day period preceding the 730-day period (or the longer portion of such 180-day period) controls. If the effect of this provision is to render the debtor ineligible for any exemption, the debtor may elect to exempt property of the kind described in the federal exemption notwithstanding state opt out.

Sec. 308. Reduction of Homestead Exemption for Fraud. Section 308 amends section 522 of the Bankruptcy Code to reduce the value of a debtor's interest in the following property that may be claimed as exempt under certain circumstances: (i) real or personal property that the debtor or a dependent of the debtor uses as a residence, (ii) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, (iii) a burial plot, or (iv) real or personal property that the debtor or dependent of the debtor claims as a homestead. Where nonexempt property is converted to the above-specified exempt property within the ten-year period preceding the filing of the bankruptcy case, the exemption must be reduced to the extent such value was acquired with the intent to hinder, delay or defraud a creditor.

Sec. 309. Protecting Secured Creditors in Chapter 13 Cases. Section 309(a) of the Act amends Bankruptcy Code section 348(f)(1)(B) to provide that valuations of property and allowed secured claims in a chapter 13 case only apply if the case is subsequently converted to one under chapter 11 or 12. If the chapter 13 case is converted to one under chapter 7, then the creditor holding security as of the petition date shall continue to be secured unless its claim was paid in full as of the conversion date. In addition, unless a prebankruptcy default has been fully cured at the time of conversion, then the default in any bankruptcy proceeding shall have the effect given under applicable nonbankruptcy law.

Section 309(b) amends section 365 of the Bankruptcy Code to provide that if a lease of personal property is rejected or not assumed by the trustee in a timely manner, such property is no longer property of the estate and the automatic stay under section 362 with respect to such property is terminated. With regard to a chapter 7 case in which the debtor is an individual, the debtor may notify the creditor in writing of his or her desire to assume the lease. Upon being so notified, the creditor may, at its option, inform the debtor that it is willing to have the lease assumed and condition such assumption on cure of any outstanding default on terms set by the contract. If within 30 days after such notice the debtor gives written notice to the lessor that the lease is assumed, the debtor (not the bankruptcy estate) assumes the liability under the lease. Section 309(b) provides that the automatic stay of section 362 and the discharge injunction of section 524 are not violated if the creditor notifies the debtor and negotiates a cure under section 365(p)(2) (as amended). In a chapter 11 or 13 case where the debtor is an individual lessee with respect to a personal property lease and the lease is not assumed in the confirmed plan, the lease is deemed rejected as of the conclusion of the confirmation hearing. If the lease is rejected, the automatic stay under section 362 as well as the chapter 13 codebtor stay under section 1301 are automatically terminated with respect to such property.

Section 309(c)(1) amends Bankruptcy Code section 1325(a)(5)(B) to require that periodic payments pursuant to a chapter 13 plan with respect to a secured claim be made in equal monthly installments. Where the claim is secured by personal property, the amount of such payments shall not be less than the amount sufficient to provide adequate protection to the holder of such claim. Section 309(c)(2) amends section 1326(a) of the Bankruptcy Code to require a chapter 13 debtor to commence making payments within 30 days after the filing of the plan or the order for relief, whichever is earlier. The amount of such payment must be the amount proposed in the plan, scheduled in a personal property lease for that portion of the obligation that becomes due postpetition (which amount shall reduce the payment required to be made to such lessor pursuant to the plan), and provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property (which amount shall reduce the payment required to be made to such secured creditor pursuant to the plan). Payments made pursuant to a plan must be retained by the chapter 13 trustee until confirmation or denial of confirmation. Section 309(c)(2) provides that if the plan is confirmed, the trustee must distribute payments received from the debtor as soon as practicable in accordance with the plan. If the plan is not confirmed, the trustee must return to the debtor payments not yet due and owing to creditors. Pending confirmation and subject to section 363, the court, after notice and a hearing, may modify the payments required under this provision. Section 309(c)(2) requires the debtor, within 60 days following the filing of the bankruptcy

case, to provide reasonable evidence of any required insurance coverage with respect to the use or ownership of leased personal property or property securing, in whole or in part, a purchase money security interest.

Sec. 310. Limitation on Luxury Goods. Section 310 amends section 523(a)(2)(C) of the Bankruptcy Code. Under current law, consumer debts owed to a single creditor that, in the aggregate, exceed $1,075 for luxury goods or services incurred within 60 days before the commencement of the case are presumed to be nondischargeable. As amended, the presumption applies if the aggregate amount of consumer debts for luxury goods or services is more than $500 for luxury goods or services incurred by an individual debtor within 90 days before the order for relief. With respect to cash advances, current law provides that cash advances aggregating more than $1,075 that are extensions of consumer credit under an open-end credit plan obtained by an individual debtor within 60 days before the case is filed are presumed to be nondischargeable. As amended, section 523(a)(2)(C) presumes that cash advances aggregating more than $750 and that are incurred within 70 days are nondischargeable. The term, "luxury goods or services," does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor. In addition, "an extension of consumer credit under an open-end credit plan" has the same meaning as this term has under the Consumer Credit Protection Act.

Sec. 311. Automatic Stay. Section 311 of the Act amends section 362(b) of the Bankruptcy Code to except from the automatic stay a judgment of eviction with respect to a residential leasehold. It is the intent of this provision to create an exception to the automatic stay of section 362(a)(3) to permit the recovery of possession by rental housing providers of their property in certain circumstances where a judgment for possession has been obtained against a debtor/resident before the filing of the petition for bankruptcy. Section 311 is intended to apply to manufactured housing communities, where tenants own their own homes and pay monthly rent to community owners for the land upon which their home sits. Tenants who fail to pay rent for the land beneath their homes located in manufactured housing communities would no longer be able to avoid their rental obligations under the protection of the automatic stay. It is also the intent of this section to permit eviction actions based on illegal use of controlled substances or endangering property to continue or to be commenced after the filing of the petition, in certain circumstances.

Section 311 gives tenants a reasonable amount of time after filing the petition to cure the default giving rise to the judgment for possession as long as there are circumstances in which applicable non-bankruptcy law allows a default to be cured after a judgment has been obtained. Where non-bankruptcy law applicable in the jurisdiction does not permit a tenant to cure a monetary default after the judgment for possession has been obtained, the automatic stay of section 362(a)(3) does not operate to limit action by a rental housing provider to proceed with**,** or a marshal, sheriff, or similar local officer to execute**,** the judgment for possession. Where the debtor claims that applicable law permits a tenant to cure after the judgment for possession has been obtained, the automatic stay operates only where the debtor files a certification with the bankruptcy petition asserting that applicable law permits such action and that the debtor or an adult dependent of the debtor has paid to the court all rent that will come due during the 30 days following the filing of the petition. If, within thirty days following the

filing of the petition, the debtor or an adult dependent of the debtor certifies that the entire monetary default that gave rise to the judgment for possession has been cured, the automatic stay remains in effect. If a lessor has filed or wishes to file an eviction action based on the use of illegal controlled substances or property endangerment, the section allows the lessor in certain cases to file a certification of such circumstance with the court and obtain an exception to the stay.

For both the judgment based on monetary default and the controlled substance or endangerment exceptions, the section provides an opportunity for challenge by either the lessor or the tenant to certifications filed by the other party and a timely hearing for the court to resolve any disputed facts and rule on the factual or legal sufficiency of the certifications. Where the court finds for the lessor, the clerk shall immediately serve upon the parties a copy of the court's order confirming that an exception to the automatic stay is applicable**.** Where the court finds for the tenant, the stay shall remain in effect**.** It is the intent of this section that the clerk's certified copy of the docket or order shall be sufficient evidence that the exception under paragraph 22 or paragraph 23 is applicable for a marshal, sheriff, or similar local officer to proceed immediately to execute the judgment for possession if applicable law otherwise permits such action, or for an eviction action for use of illegal controlled substances or property endangerment to proceed. This section does not provide any new right to either landlords or tenants relating to evictions or defenses to eviction under otherwise applicable law.

Section 311 also excepts from the automatic stay a transfer that is not avoidable under Bankruptcy Code section 544 and that is not avoidable under Bankruptcy Code section 548. This amendment responds to a 1997 Ninth Circuit case in which two purchase money lenders (without knowledge that the debtor had recently filed and undisclosed chapter 11 case that was later converted to chapter 7), funded the debtor's acquisition of an apartment complex and recorded their purchase-money deed of trust immediately following recordation of the deed to the debtors.[3]

Sec. 312. Extension of Period Between Bankruptcy Discharges. Section 312 of the Act amends section 727(a)(8) of the Bankruptcy Code to extend the period before which a chapter 7 debtor may

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[3]Thompson v. Margen (*In re* McConville), 110 F.3d 47 (9th Cir.), *cert. denied*, 522 U.S. 966 (1997). The bankruptcy trustee sought to avoid the lien created by the lenders' deed of trust by asserting that the deed was an unauthorized, postpetition transfer under Bankruptcy Code section 549(a). The lenders claimed that the voluntary transfer to them was a transfer of real property to good faith purchasers for value, which thereby excepted it, under Bankruptcy Code section 549(c) from avoidance. The bankruptcy court held that the postpetition recordation of the lenders' deed of trust was without authorization under the Bankruptcy Code or by the court and was therefore avoidable under section 549(a) and that the lenders did not qualify under the section 549(c) exception as good faith purchasers of real property for value. The District Court subsequently affirmed the bankruptcy court's ruling granting the trustee the authority to avoid the lenders' lien. McConville v. David Margen and Lawton Associates (*In re* McConville), No. C 94-3308, 1994 U.S. Dist. LEXIS 18095 (N.D. Cal. Dec. 14, 1994). On appeal, the lower court's decision in *McConville* was initially affirmed. Thompson v. Margen (*In re* McConville), 84 F.3d 340 (9th Cir. 1996). The Ninth Circuit, however, subsequently issued an amended opinion, also affirming the lower court, Thompson v. Margen *(In re* McConville), 97 F.3d 316 (9th Cir. 1996), and finally issued an opinion withdrawing its prior opinion and deciding the case on other grounds. It held that by obtaining secured credit from the lenders after filing but before the appointment of a trustee, the debtors violated their fiduciary responsibility to their creditors. Thompson v. Margen (*In re* McConville), 110 F.3d 47 (9th Cir. 1997).

receive a subsequent chapter 7 discharge from six to 8 years. It also amends section 1328 to prohibit the issuance of a discharge in a subsequent chapter 13 case if the debtor received a discharge in a prior chapter 7, 11, or 12 case within four years preceding the filing of the subsequent chapter 13 case.

Sec. 313. Definition of Household Goods and Antiques. Subsection (a) of section 313 of the Act amends section 522(f) of the Bankruptcy Code to codify a modified version of the Federal Trade Commission's definition of ``household goods'' for purposes of the avoidance of a nonpossessory, nonpurchase money lien in such property. It also specifies various items that are expressly not household goods. Section 313(b) requires the Director of the Executive Office for United States Trustees to prepare a report containing findings with respect to the use of this definition. The report may include recommendations for amendments to the definition of "household goods" as codified in section 522(f)(4). Section 313 specifies a monetary threshold for the exclusions pertaining to electronic entertainment equipment, antiques, and jewelry. In addition, it provides that works of art are not household goods, unless by or of the debtor or by any relative of the debtor.

Sec. 314. Debt Incurred To Pay Nondischargeable Debts. Subsection (a) of section 314 of the Act amends section 523(a) of the Bankruptcy Code to make a debt incurred to pay a nondischargeable tax owed to a governmental unit (other than a tax owed to the United States) nondischargeable. Section 314(b) amends section 1328(a) of the Bankruptcy Code to make the following additional debts nondischargeable in a chapter 13 case: (1) debts for money, property, services, or extensions of credit obtained through fraud or by a false statement in writing under section 523(a)(2)(A) and (B) of the Bankruptcy Code; (2) consumer debts owed to a single creditor that aggregate to more than $500 for luxury goods or services incurred by an individual debtor within 90 days before the filing of the bankruptcy case, and cash advances aggregating more than $750 that are extensions of consumer credit obtained by a debtor under an open-end credit plan within 70 days before the order for relief under section 523(a)(2)(C) (as amended); (3) pursuant to section 523(a)(3) of the Bankruptcy Code, debts that require timely request for a dischargeability determination, if the creditor lacks notice or does not have actual knowledge of the case in time to make such request; (4) debts resulting from fraud or defalcation by the debtor acting as a fiduciary under section 523(a)(4) of the Bankruptcy Code; and (5) debts for restitution or damages, awarded in a civil action against the debtor as a result of willful or malicious conduct by the debtor that caused personal injury to an individual or the death of an individual.

Sec. 315. Giving Creditors Fair Notice in Chapters 7 and 13 Cases. Section 315 of the Act amends several provisions of the Bankruptcy Code. Subsection (a) amends Bankruptcy Code section 342(c) to delete the provision specifying that the failure of a notice to include certain information required to be given by a debtor to a creditor does not invalidate the notice's legal effect. It adds a provision requiring a debtor to send any notice he or she must provide under the Bankruptcy Code to the address stated by the creditor and to include in such notice the current account number, if within 90 days prior to the date that the debtor filed for bankruptcy relief the creditor in at least two communications sent to the debtor set forth such address and account number. If the creditor would be in violation of applicable nonbankruptcy law by sending any such communication during this time period, then the debtor must send the notice to the address provided by the creditor stated in the last two

communications containing the creditor's address and such notice shall include the current account number. Section 315(a) also permits a creditor in a chapter 7 or 13 case (where the debtor is an individual) to file with the court and serve on the debtor the address to be used to notify such creditor in that case. Five days after receipt of such notice, the court and the debtor, respectively, must use the address so specified to provide notice to such creditor. In addition, section 315(a) specifies that if an entity files a notice with the court stating an address to be used generally by all bankruptcy courts for chapter 7 and 13 cases, or by particular bankruptcy courts, as specified by such entity. This address must be used by the court to supply notice in such cases within 30 days following the filing of such notice where the entity is a creditor. Notice given other than as provided in section 342 is not effective until it has been brought to the creditor's attention. If the creditor has designated a person or organizational subdivision to be responsible for receiving notices concerning bankruptcy cases and has established reasonable procedures so that these notices will be delivered to such person or subdivision, a notice will not be deemed to have been received by the creditor until it has been received by such person or subdivision. This provision also prohibits the imposition of any monetary penalty for violation of the automatic stay or for the failure to comply with the Bankruptcy Code sections 542 and 543 unless the creditor has received effective notice under section 342.

Section 315(b) amends section 521 to specify additional duties of a debtor. This provision requires the debtor to file a certificate executed by the debtor's attorney or bankruptcy petition preparer stating that the attorney or preparer supplied the debtor with the notice required under Bankruptcy Code section 342(b). If the debtor is not represented by counsel and did not use the services of a bankruptcy petition preparer, then the debtor must sign a certificate stating that he or she obtained and read such notice. In addition, the debtor must file: (1) copies of all payment advices or other evidence of payment, if any, from any employer within 60 days preceding the bankruptcy filing; (2) a statement of the amount of monthly net income, itemized to show how such amount is calculated; and (3) a statement disclosing any reasonably anticipated increase in income or expenditures in the 12-month period following the date of filing. Upon request of a creditor, section 315(b) of the Act requires the court to make the petition, schedules, and statement of financial affairs of an individual who is a chapter 7 or 13 debtor available to such creditor.

In addition, section 315(b) requires such debtor to provide the trustee not later than seven days before the date first set for the meeting of creditors a copy of his or her Federal income tax return or transcript (at the election of the debtor) for the latest taxable period ending prior to the filing of the bankruptcy case for which a tax return was filed. Should the debtor fail to comply with this requirement, the case must be dismissed unless the debtor demonstrates that such failure was due to circumstances beyond the debtor's control. In addition, the debtor must file copies of any amendments to such tax returns. Upon request, the debtor must provide a copy of the tax return or transcript to the requesting creditor at the time the debtor supplies the return or transcript to the trustee. A creditor in a chapter 13 case may, at any time, file a notice with the court requesting a copy of the plan. The court must supply a copy of the chapter 13 plan at a reasonable cost not later than 5 days after such request. In addition, the Act clarifies that this provision applies to Federal income tax returns.

During the pendency of a chapter 7, 11 or 13 case, the debtor must file with the court, at the

request of the judge, United States trustee, or any party in interest, at the time filed with the taxing authority, copies of any Federal income tax returns (or transcripts thereof) that were not filed for the three-year period preceding the date on which the order for relief was entered. In addition, the debtor must file copies of any amendments to such tax returns.

In a chapter 13 case, the debtor must file a statement, under penalty of perjury, of income and expenditures in the preceding tax year and monthly income showing how the amounts were calculated. The statement must be filed on the date that is the later of 90 days after the close of the debtor's tax year or one year after the order for relief, unless a plan has been confirmed. Thereafter, the statement must be filed on or before the date that is 45 days before the anniversary date of the plan's confirmation, until the case is closed. The statement must disclose the amount and sources of the debtor's income, the identity of any persons responsible with the debtor for the support of the debtor's dependents, the identity of any persons who contributed to the debtor's household expenses, and the amount of any such contributions.

Section 315(b)(2) mandates that the tax returns, amendments thereto, and the statement of income and expenditures of an individual who is a chapter 7 or chapter 13 debtor be made available to the United States trustee or bankruptcy administrator, the trustee, and any party in interest for inspection and copying, subject to procedures established by the Director of the Administrative Office for United States Courts within 180 days from the date of enactment of this Act. The procedures must safeguard the confidentiality of any tax information required under this provision and include restrictions on creditor access to such information. In addition, the Director must, within 540 days from the Act's enactment date, prepare and submit to Congress a report that assesses the effectiveness of such procedures and, if appropriate, includes recommendations for legislation to further protect the confidentiality of such tax information and to impose penalties for its improper use. If requested by the United States trustee or trustee, the debtor must provide a document establishing the debtor's identity, which may include a driver's license, passport, or other document containing a photograph of the debtor, and such other personal identifying information relating to the debtor.

Sec. 316. Dismissal for Failure To Timely File Schedules or Provide Required Information. Section 316 of the Act amends section 521 of the Bankruptcy Code to provide that if an individual debtor in a voluntary chapter 7 or chapter 13 case fails to file all of the information required under section 521(a)(1) within 45 days of the date on which the case is filed, the case must be automatically dismissed, effective on the 46th day. The 45-day period may be extended for an additional 45-day period providing the debtor requests such extension prior to the expiration of the original 45-day period and the court finds justification for such extension. Upon request of a party in interest, the court must enter an order of dismissal within 5 days of such request. Section 316 provides that a court may decline to dismiss the case if: (1) the trustee files a motion before the stated time periods; (2) the court finds, after notice and a hearing, that the debtor in good faith attempted to file all the information required under section 521(a)(1)(B)(iv); and (3) the court finds that the best interests of creditors would be served by continued administration of the case.

Sec. 317. Adequate Time To Prepare for Hearing on Confirmation of the Plan. Section 317 of the

Act amends section 1324 of the Bankruptcy Code to require the chapter 13 confirmation hearing to be held not earlier than 20 days following the first date set for the meeting of creditors and not later than 45 days from this date, unless the court determines that it would be in the best interests of creditor and the estate to hold such hearing at an earlier date and there is no objection to such earlier date.

Sec. 318. Chapter 13 Plans To Have a 5-Year Duration in Certain Cases. Paragraph (1) of section 318 of the Act amends Bankruptcy Code sections 1322(d) and 1325(b) to specify that a chapter 13 plan may not provide for payments over a period that is not less than five years if the current monthly income of the debtor and the debtor's spouse combined exceeds certain monetary thresholds. If the current monthly income of the debtor and the debtor's spouse fall below these thresholds, then the duration of the plan may not be longer than three years, unless the court, for cause, approves a longer period up to five years. The applicable commitment period may be less if the plan provides for payment in full of all allowed unsecured claims over a shorter period. Section 318(2), (3), and (4) make conforming amendments to sections 1325(b) and 1329(c) of the Bankruptcy Code.

Sec. 319. Sense of Congress Regarding Expansion of Rule 9011 of the Federal Rules of Bankruptcy Procedure. Section 319 of the Act expresses a sense of the Congress that Federal Rule of Bankruptcy Procedure 9011 be modified to require that any document, whether signed or unsigned, including schedules, supplied to the court or the trustee by a debtor may be submitted only after the debtor or the debtor's attorney has made reasonable inquiry to verify that the information contained in such documents is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Sec. 320. Prompt Relief from Stay in Individual Cases. Section 320 of the Act amends section 362(e) of the Bankruptcy Code to terminate the automatic stay in a chapter 7, 11, or 13 case of an individual debtor within 60 days following a request for relief from the stay, unless the bankruptcy court renders a final decision prior to the expiration of the 60-day time period, such period is extended pursuant to agreement of all parties in interest, or a specific extension of time is required for good cause as described in findings made by the court.

Sec. 321. Chapter 11 Cases Filed by Individuals. Section 321(a) of the Act creates a new provision under chapter 11 of the Bankruptcy Code specifying that property of the estate of an individual debtor includes, in addition to that identified in section 541 of the Bankruptcy Code, all property of the kind described in section 541 that the debtor acquires after commencement of the case, but before the case is closed, dismissed or converted to a case under chapter 7, 12, or 13 (whichever occurs first). In addition, it includes earnings from services performed by the debtor after commencement of the case, but before the case is closed, dismissed or converted to a case under chapter 7, 12, or 13. Except as provided in section 1104 of the Bankruptcy Code or the order confirming a chapter 11 plan, section 321(a) provides that the debtor remains in possession of all property of the estate.

Section 321(b) amends Bankruptcy Code section 1123 to require the chapter 11 plan of an individual debtor to provide for the payment to creditors of all or such portion of the debtor's earnings from personal services performed after commencement of the case or other future income that is

necessary for the plan's execution.

Section 321(c) amends Bankruptcy Code section 1129(a) to include an additional requirement for confirmation in a chapter 11 case of an individual debtor upon objection to confirmation by a holder of an allowed unsecured claim. In such instance, the value of property to be distributed under the plan on account of such claim, as of the plan's effective date, must not be less than the amount of such claim; or be not less than the debtor's projected disposable income (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan or during the plan's term, whichever is longer. Section 321(c) also amends section 1129(b)(2)(B)(ii) of the Bankruptcy Code to provide that an individual chapter 11 debtor may retain property included in the estate under section 1115 (as added by the Act), subject to section 1129(a)(14).

Section 321(d)(1) amends Bankruptcy Code section 1141(d) to provide that a discharge under chapter 11 does not discharge a debtor who is an individual from any debt excepted from discharge under Bankruptcy Code section 523. Section 321(d)(2) of the Act provides that in a chapter 11 individual debtor is not discharged until all plan payments have been made. The court may grant a hardship discharge if the value of property actually distributed under the plan – as of the plan's effective date – is not less than the amount that would have been available for distribution if the case was liquidated under chapter 7 on such date, and modification of the plan is not practicable.

Section 321(e) of the Act amends section 1127 to permit a plan in a chapter 11case of an individual debtor to be modified postconfirmation for the purpose of increasing or reducing the amount of payments, extending or reducing the time period for such payments, or altering the amount of distribution to a creditor whose claim is provided for by the plan. Such modification may be made at any time on request of the debtor, trustee, United States trustee, or holder of an allowed unsecured claim, if the plan has not been substantially consummated.

Section 321(f) specifies that sections 1121 through 1129 apply to such modification. In addition, it provides that the modified plan shall become the confirmed plan only if: (1) there has been disclosure pursuant to section 1125 (as the court directs); (2) notice and a hearing; and (3) such modification is approved.

Sec. 322. Limitations on Homestead Exemption. Section 322(a) amends section 522 of the Bankruptcy Code to impose an aggregate monetary limitation of $125,000, subject to Bankruptcy Code sections 544 and 548, on the value of property that the debtor may claim as exempt under State or local law pursuant to section 522(b)(3)(A) under certain circumstances. The monetary cap applies if the debtor acquired such property within the 1215-day period preceding the filing of the petition and the property consists of any of the following: (1) real or personal property of the debtor or that a dependent of the debtor uses as a residence; (2) an interest in a cooperative that owns property, which the debtor or the debtor's dependent uses as a residence; (3) a burial plot for the debtor or the debtor's dependent; or (4) real or personal property that the debtor or dependent of the debtor claims as a homestead. This limitation does not apply to a principal residence claimed as exempt by a family farmer. In addition, the limitation does not apply to any interest transferred from a debtor's principal

residence (which was acquired prior to the beginning of the specified time period) to the debtor's current principal residence, if both the previous and current residences are located in the same State.

Section 322(a) further amends section 522 to add a provision that does not allow a debtor to exempt any amount of an interest in property described in the preceding paragraph in excess of $125,000 if any of the following applies:

(1) court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of the Bankruptcy Code; or

(2) debtor owes a debt arising from:

- (a) any violation of the federal securities laws defined in section 3(a)(47) of the Securities and Exchange Act of 1934, any state securities laws, or any regulation or order issued under Federal securities laws or state securities laws;
- (b) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934, or under section 6 of the Securities Act of 1933;
- (c) any civil remedy under section 1964 of title 18 of the United States Code; or
- (d) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

An exception to the monetary limit applies to the extent the value of the homestead property is reasonably necessary for the support of the debtor and any dependent of the debtor. The monetary limitation set forth in section 322(a) is subject to automatic adjustment pursuant to section 104 of the Bankruptcy Code.

Sec. 323. Excluding Employee Benefit Plan Participant Contributions and Other Property from the Estate. Section 323 of the Act amends section 541(b) of the Bankruptcy Code to exclude as property of the estate funds withheld or received by an employer from its employees' wages for payment as contributions to specified employee retirement plans, deferred compensation plans, and tax-deferred annuities. Such contributions do not constitute disposable income as defined in section 1325(b)(2) of the Bankruptcy Code. Section 323 also excludes as property of the estate funds withheld by an employer from the wages of its employees for payment as contributions to health insurance plans regulated by State law.

Sec. 324. Exclusive Jurisdiction in Matters Involving Bankruptcy Professionals. Section 324 of the Act amends section 1334 of title 28 of the United State Code to give a district court exclusive jurisdiction of all claims or causes of action involving the construction of section 327 of the Bankruptcy Code or rules relating to disclosure requirements under such provision.

Sec. 325. United States Trustee Program Filing Fee Increase. Section 325(a) of the Act amends section 1930(a) of title 28 of the United States Code to increase the chapter 7 filing fee from $155 to

$200 and decrease the chapter 13 filing fee from $155 to $150. It also increases the chapter 11 filing fee from $800 to $1,000 . Subsection 325(b) amends section 589a of title 28 of the United States Code to reallocate the percentage of certain filing fees collected for the United States Trustee Fund. Subsection 325(c) amends section 406(b) of the Judiciary Appropriations Act of 1990 to reallocate the percentage of certain filing fees collected under section 1930 of title 28 of the United States Code to fund the operation and maintenance of the federal court system. Section 325(d) provides that the amendments made by subsections (b) and (c) are effective for the two-period beginning on the Act's date of enactment. Section 325(e)(1) mandates that the amount of fees collected under 28 U.S.C. § 1930(a)(1) (chapter 7 filing fees) and 28 U.S.C. § 1930(a)(3) (chapter 11 filing fees) that is greater than the amount that would have been collected if these provisions were not amended by section 325 be allocated to the extent necessary to pay for the salaries and benefits of judges appointed pursuant to section 1223 of this Act. Section 325(e)(2) provides that any amount of fees in excess of that used to pay the salaries and benefits of judges appointed pursuant to section 1223 be deposited in the Treasury to the extent necessary to offset the decrease in governmental receipts resulting from the amendments made by section 325(b) (United States Trustee Fund) and section 325(c) (federal court system fund).

Sec. 326. Sharing of Compensation. Section 326 amends Bankruptcy Code section 504 to create a limited exception to the prohibition against fee sharing. The provision allows the sharing of compensation with bona fide public service attorney referral programs that operate in accordance with non-federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals.

Sec. 327. Fair Valuation of Collateral. Section 327 of the Act amends section 506(a) of the Bankruptcy Code to provide that the value of an allowed claim secured by personal property that is an asset in an individual debtor's chapter 7 or 13 case is determined based on the replacement value of such property as of the filing date of the bankruptcy case without deduction for selling or marketing costs. With respect to property acquired for personal, family, or household purposes, replacement value is the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time its value is determined.

Sec. 328. Defaults Based on Nonmonetary Obligations. Subsection (a)(1) of section 328 of the Act amends section 365(b) to provide that a trustee does not have to cure a default that is a breach of a provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform a nonmonetary obligation under an unexpired lease of real property, if it is impossible for the trustee to cure the default by performing such nonmonetary act at and after the time of assumption. If the default arises from a failure to operate in accordance with a nonresidential real property lease, the default must be cured by performance at and after the time of assumption in accordance with the lease. Pecuniary losses resulting from such default must be compensated pursuant to section 365(b)(1). In addition, section 328(a)(1) amends section 365(b)(2)(D) to clarify that it applies to penalty provisions. Section 328(a)(2) through (4) make technical revisions to section 365(c), (d) and (f) by deleting

language that is no longer effective pursuant to the Rail Safety Enforcement and Review Act.[4]

Section 328(b) amends section 1124(2)(A) of the Bankruptcy Code to clarify that a claim is not impaired if section 365(b)(2) (as amended by this Act) expressly does not require a default with respect to such claim to be cured. In addition, it provides that any claim or interest that arises from the failure to perform a nonmonetary obligation (other than a default arising from the failure to operate a nonresidential real property lease subject to section 365(b)(1)(A)), is impaired unless the holder of such claim or interest (other than the debtor or an insider) is compensated for any actual pecuniary loss incurred by the holder as a result of such failure.

Sec. 329. Clarification of Postpetition Wages and Benefits. Section 329 amends Bankruptcy Code section 503(b)(1)(A) to accord administrative expense status to certain back pay awards. This provision applies to a back pay award attributable to any period of time occurring postpetition as a result of a violation of federal or state law by the debtor pursuant to an action brought in a court or before the National Labor Relations Board, providing the bankruptcy court determines that the award will not substantially increase the probability of layoff or termination of current employees or of nonpayment of domestic support obligations.

Sec. 330. Delay of Discharge During Pendency of Certain Proceedings. Section 330 of the Act amends section 727(a) of the Bankruptcy Code to require the court to withhold the entry of a debtor's discharge order if the court, after notice and a hearing, finds that there is reasonable cause to believe that there is pending a proceeding in which the debtor may be found guilty of a felony of the kind described in Bankruptcy Code section 522(q)(1) or liable for a debt of the kind described in Bankruptcy Code section 522(q)(2).

Sec. 331. Limitation on Retention Bonuses, Severance Pay, and Certain Other Payments. Section 331 amends Bankruptcy Code section 503 to prohibit the allowance or payment of certain transfers or obligations, unless otherwise authorized by the court. It applies to transfers made to or obligations incurred for the benefit of an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, unless the court makes certain specified findings. In addition, it prohibits a severance payment to an insider of a debtor, unless it satisfies certain criteria. Further, it prohibits the payment of other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, mangers, or consultants hired after the date of the filing of the petition.

Sec. 332. Fraudulent Involuntary Bankruptcy. Bankruptcy Code section 303 permits a creditor to force an individual or business into bankruptcy by filing an involuntary bankruptcy petition against such entity. Before an order for relief is entered in the case, the court must make certain findings that support granting such relief (e.g., the debtor is generally not paying debts as they become due; a custodian was appointed within the 120-day period preceding the filing of the petition). If such findings

[4]Pub. L. No. 102-365, 106 Stat. 972 (1992).

are not made, the court can dismiss the case. As with most documents filed in connection with a bankruptcy case, the filing of an involuntary bankruptcy petition is a matter of public record and is open for examination by any entity.[5] In addition, the Fair Credit Reporting Act[6] permits credit reporting agencies to note the involuntary bankruptcy filing on a person's credit report for up to ten years.[7] Although the Fair Credit Reporting Act permits a consumer to have his or her credit report revised to reflect the fact, for instance, that the involuntary bankruptcy case was dismissed prior to the entry of an order for relief, the report may, nevertheless, still refer to the filing of the case.[8] Unfortunately, tax protesters and other extremists, in addition to other forms of obstreperous litigation (such as filing false liens), are now resorting to filing fraudulent involuntary bankruptcy petitions against public officials and other innocent parties. In 2002, for example, one tax protester filed fraudulent involuntary bankruptcy petitions against 36 local public officials in Wisconsin,[9] some of whom did not find out about the petitions until "they attempted to use a credit card or execute some other financial transaction."[10] These fraudulent involuntary petition filings were subsequently dismissed by the bankruptcy court, which found that they were filed in bad faith without legal basis and were commenced "for the sole purpose of harassment of the named public officials."[11] Nevertheless, "[d]espite the fact that the [fraudulent involuntary bankruptcy] petitions are often dismissed," as one State assistant attorney general observed, "the filings continue to cause financial problems for the victims."[12] The devastating effect of a fraudulent involuntary bankruptcy filing on an innocent person's credit rating is illustrated by what occurred in Wisconsin and its aftermath. Although the bankruptcy court in dismissing these cases also directed all credit reporting agencies to expunge any record of these filings from the officials' credit

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[5] 11 U.S.C. § 107(a).

[6] 15 U.S.C. § 1681.

[7] 15 U.S.C. § 1681c(a)(1).

[8] *See, e.g.*, 15 U.S.C. Sec. 1681i (2000); Letter from Ronald G. Isaac, Attorney, Federal Trade Commission--Division of Financial Practices/Bureau of Consumer Protection, to Anonymous (Nov. 5, 1999), available at http://www.ftc.gov/os/statutues/frca/anon.htm.

[9] *See In re* Kenealy, No. 02-26100-MDM (Bankr. E.D. Wis. May 21, 2002). Involuntary petitions "were filed against all but one of the County Board supervisors," the county corporation counsel, county sheriff, clerk of courts, and county circuit judge. Jeff Cole, *Paperwork Used for Revenge; Protester's Bogus Bankruptcy Petitions Temporarily Disrupt Officials' Credit*, MILWAUKEE J. SENTINEL, June 6, 2002, at 1B. The protester also filed numerous liens in the amount of $15 million against these individuals as well. Jeff Cole, *Man Charged with Filing False Documents; Town of Fredonia Protester's Case is 5th Brought by State*, MILWAUKEE J. SENTINEL, May 21, 2002, at 1B.

[10] Jeff Cole, *Paperwork Used for Revenge; Protester's Bogus Bankruptcy Petitions Temporarily Disrupt Officials' Credit*, MILWAUKEE J. SENTINEL, June 6, 2002, at 1B.

[11] *In re* Kenealy, No. 02-26100-MDM (Bankr. E.D. Wis. May 21, 2002).

[12] Roy Korte, Terrorism: A Law Enforcement Perspective, Anti-Defamation League (2002), at http://www.adl.org/learn/columns/roy5%5korte.asp.

reports,[13] the bankruptcy petition filings nevertheless "caused some officials' credit cards to be canceled, almost caused the sale of one supervisor's house to be stopped, and caused continuing credit problems for other officials."[14]

Section 332 responds to these concerns by permitting the court to seal and subsequently expunge all records pertaining to a fraudulent involuntary petition. Section 332(a) sets forth the short title of the section as the "Involuntary Bankruptcy Improvement Act of 2005." Section 332(b) amends Bankruptcy Code section 303 to permit the court, upon motion of the debtor, to seal all court records pertaining to an involuntary bankruptcy petition if: (1) the petition is false or contains any materially false, fictitious, or fraudulent statement; (2) the debtor is an individual; and (3) the court dismisses the petition. The provision further permits the court, if the debtor is an individual, to prohibit any consumer reporting agency from making any consumer report that contains any information relating to such petition or to the case commenced by the filing of such petition. It further provides that upon the expiration of the statute of limitations described in 18 U.S.C. § 3282 for a violation of 18 U.S.C. § 152 (concerning crimes for concealment of assets, false oaths and claims, and bribery) and 18 U.S.C. § 157 (bankruptcy fraud), the court may, upon motion of the debtor and for good cause, expunge any records pertaining to such petition. Section 332(c) amends section 157 of title 18 to make it a criminal offense to file a fraudulent involuntary bankruptcy petition. Section 332 is similar to legislation considered by the House in the 108th Congress.[15]

TITLE IV. GENERAL AND SMALL BUSINESS BANKRUPTCY PROVISIONS

Subtitle A. General Business Bankruptcy Provisions

Sec. 401. Adequate Protection for Investors. Subsection (a) of section 401 of the Act amends section 101 of the Bankruptcy Code to define "securities self regulatory organization" as a securities association or national securities exchange registered with the Securities and Exchange Commission. Section 401(b) amends section 362 of the Bankruptcy Code to except from the automatic stay certain enforcement actions by a securities self regulatory organization.

Sec. 402. Meetings of Creditors and Equity Security Holders. Section 402 amends section 341 of the Bankruptcy Code to permit a court, on request of a party in interest and after notice and a hearing, to order the United States trustee not to convene a meeting of creditors or equity security holders if a

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[13] *In re* Kenealy, No. 02-26100-MDM (Bankr. E.D. Wis. May 21, 2002).

[14] Jeff Cole, *"Paper Terrorist" Gets Five Years in Prison*, MILWAUKEE J. SENTINEL, Jan. 18, 2003, at 1B.

[15] H.R. 1529, 108th Cong. (2003). The bill was ordered favorably reported without amendment by the House Judiciary Committee, H. REP. NO. 108-110 (2003), and passed by voice vote by the House. 149 CONG. REC. H5104 (daily ed. June 10, 2003). The principal difference between this legislation and section 332 of the Act is that the bill would have permitted the court to expunge the case upon dismissal of the fraudulent involuntary petition.

debtor has filed a plan for which the debtor solicited acceptances prior to the commencement of the case.

Sec. 403. Protection of Refinance of Security Interest. Section 403 amends section 547(e)(2) of the Bankruptcy Code to increase the perfection period from ten to 30 days for the purpose of determining whether a transfer is an avoidable preference.

Sec. 404. Executory Contracts and Unexpired Leases. Subsection (a) of section 404 of the Act amends section 365(d)(4) of the Bankruptcy Code to establish a firm, bright line deadline by which an unexpired lease of nonresidential real property must be assumed or rejected. If such lease is not assumed or rejected by such deadline, then such lease shall be deemed rejected, and the trustee shall immediately surrender such property to the lessor. Section 404(a) permits a bankruptcy trustee to assume or reject a lease on a date which is the earlier of the date of confirmation of a plan or the date which is 120 days after the date of the order for relief. A further extension of time may be granted, within the 120 day period, for an additional 90 days, for cause, upon motion of the trustee or lessor. Any subsequent extension can only be granted by the judge upon the prior written consent of the lessor either by the lessor's motion for an extension or on motion of the trustee, provided that the trustee has the prior written approval of the lessor. This provision is designed to remove the bankruptcy judge's discretion to grant extensions of the time for the retail debtor to decide whether to assume or reject a lease after a maximum possible period of 210 days from the time of entry of the order of relief. Beyond that maximum period, the judge has no authority to grant further time unless the lessor has agreed in writing to the extension.

Section 404(b) amends section 365(f)(1) to assure that section 365(f) does not override any part of section 365(b). Thus, section 404(b) makes a trustee's authority to assign an executory contract or unexpired lease subject not only to section 365(c), but also to section 365(b), which is given full effect. Therefore, for example, assumption or assignment of a lease of real property in a shopping center must be subject to the provisions of the lease, such as use clauses.

Sec. 405. Creditors and Equity Security Holders Committees. Subsection (a) of section 405 of the Act amends section 1102(a)(2) of the Bankruptcy Code to permit, after notice and a hearing, a court, on its own motion or on motion of a party in interest, to order a change in a committee's membership to ensure adequate representation of creditors or equity security holders in a chapter 11 case. It specifies that the court may direct the United States trustee to increase the membership of a committee for the purpose of including a small business concern if the court determines that such creditor's claim is of the kind represented by the committee and that, in the aggregate, is disproportionately large when compared to the creditor's annual gross revenue.

Section 405(b) requires the committee to give creditors having claims of the kind represented by the committee access to information. In addition, the committee must solicit and receive comments from these creditors and, pursuant to court order, make additional reports or disclosures available to them.

Sec. 406. Amendment to Section 546 of Title 11, United States Code. Section 406 of the Act corrects an erroneous subsection designation in section 546 of the Bankruptcy Code. It redesignates the second subsection (g) as subsection (i). In addition, section 406 amends section 546(i) (as redesignated) to subject that provision to the prior rights of security interest holders. Further, section 406 adds a new provision to section 546 that prohibits a trustee from avoiding a warehouse lien for storage, transportation, or other costs incidental to the storage and handling of goods. It specifies that this prohibition must be applied in a manner consistent with any applicable state statute that is similar to section 7-209 of the Uniform Commercial Code.

Sec. 407. Amendments to Section 330(a) of Title 11, United States Code. Section 407 amends section 330(a)(3) of the Bankruptcy Code to clarify that this provision applies to examiners, chapter 11 trustees, and professional persons. This section also amends section 330(a) to add a provision that requires a court, in determining the amount of reasonable compensation to award to a trustee, to treat such compensation as a commission pursuant to section 326 of the Bankruptcy Code.

Sec. 408. Postpetition Disclosure and Solicitation. Section 408 amends section 1125 of the Bankruptcy Code to permit an acceptance or rejection of a chapter 11 plan to be solicited from the holder of a claim or interest if the holder was solicited before the commencement of the case in a manner that complied with applicable nonbankruptcy law.

Sec. 409. Preferences. Section 409 amends section 547(c)(2) of the Bankruptcy Code to provide that a trustee may not avoid a transfer to the extent such transfer was in payment of a debt incurred by the debtor in the ordinary course of the business or financial affairs of the debtor and the transferee and such transfer was made either: (1) in the ordinary course of the debtor's and the transferee's financial affairs or business; or (2) in accordance with ordinary business terms. Present law requires the recipient of a preferential transfer to establish both of these grounds in order to sustain a defense to a preferential transfer proceeding. In a case in which the debts are not primarily consumer debts, section 409 provides that a transfer may not be avoided if the aggregate amount of all property constituting or affected by the transfer is less than $5,000.

Sec. 410. Venue of Certain Proceedings. Section 1409(b) of title 28 of the United States Code provides that a proceeding to recover a money judgment of or property worth less than certain specified amounts must be commenced in the district where the defendant resides. Section 410 amends section 1409(b) to provide that a proceeding to recover a debt (excluding a consumer debt) against a noninsider of the debtor that is less than $10,000 must be commenced in the district where the defendant resides. In addition, section 410 increases the $5,000 threshold for a consumer debt[16] to $15,000.

Sec. 411. Period for Filing Plan under Chapter 11. Section 411 amends section 1121(d) of the

[16] A consumer debt is defined as a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8).

Bankruptcy Code to mandate that a chapter 11 debtor's exclusive period for filing a plan may not be extended beyond a date that is 18 months after the order for relief. In addition, it provides that the debtor's exclusive period for obtaining acceptances of the plan may not be extended beyond 20 months after the order for relief.

Sec. 412. Fees Arising from Certain Ownership Interests. Section 412 amends section 523(a)(16) of the Bankruptcy Code to broaden the protections accorded to community associations with respect to fees or assessments arising from the debtor's interest in a condominium, cooperative, or homeowners' association. Irrespective of whether or not the debtor physically occupies such property, fees or assessments that accrue during the period the debtor or the trustee has a legal, equitable, or possessory ownership interest in such property are nondischargeable.

Sec. 413. Creditor Representation at First Meeting of Creditors. Section 413 amends section 341(c) of the Bankruptcy Code to permit a creditor holding a consumer debt or any representative of such creditor, notwithstanding any local court rule, provision of a state constitution, or any otherwise applicable nonbankruptcy law, or any other requirement that such creditor must be represented by counsel, to appear at and participate in a section 341 meeting of creditors in chapter 7 and chapter 13 cases either alone or in conjunction with an attorney. In addition, the provision clarifies that it cannot be construed to require a creditor to be represented by counsel at any meeting of creditors.

Sec. 414. Definition of Disinterested Person. Section 414 amends section 101(14) of the Bankruptcy Code to eliminate the requirement that an investment banker be a disinterested person.

Sec. 415. Factors for Compensation of Professional Persons. Section 415 amends section 330(a)(3) of the Bankruptcy Code to permit the court to consider, in awarding compensation to a professional person, whether such person is board certified or otherwise has demonstrated skill and experience in the practice of bankruptcy law.

Sec. 416. Appointment of Elected Trustee. Section 416 of the Act amends section 1104(b) of the Bankruptcy Code to clarify the procedure for the election of a trustee in a chapter 11 case. Section 1104(b) permits creditors to elect an eligible, disinterested person to serve as the trustee in the case, provided certain conditions are met. Section 416 amends this provision to require the United States trustee to file a report certifying the election of a chapter 11 trustee. Upon the filing of the report, the elected trustee is deemed to be selected and appointed for purposes of section 1104 and the service of any prior trustee appointed in the case is terminated. Section 416 also clarifies that the court shall resolve any dispute arising out of a chapter 11 trustee election.

SEC. 417. Utility Service. Section 417 amends section 366 of the Bankruptcy Code to provide that assurance of payment, for purposes of this provision, includes a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption, or other form of security that is mutually agreed upon by the debtor or trustee and the utility. It also specifies that an administrative expense priority does not constitute an assurance of payment. With respect to chapter 11 cases, section 417 permits a utility to alter, refuse or discontinue service if it does not receive adequate assurance of

payment that is satisfactory to the utility within 30 days of the filing of the petition. The court, upon request of a party in interest, may modify the amount of this payment after notice and a hearing. In determining the adequacy of such payment, a court may not consider: (1) the absence of security before the case was filed; (2) the debtor's timely payment of utility service charges before the case was filed; or (3) the availability of an administrative expense priority. Notwithstanding any other provision of law, section 417 permits a utility to recover or set off against a security deposit provided prepetition by the debtor to the utility without notice or court order.

Sec. 418. Bankruptcy Fees. Section 418 of the Act amends section 1930 of title 28 of the United States Code to permit a district court or a bankruptcy court, pursuant to procedures prescribed by the Judicial Conference of the United States, to waive the chapter 7 filing fee for an individual and certain other fees under subsections (b) and (c) of section 1930 if such individual's income is less than 150 percent of the official poverty level (as defined by the Office of Management and Budget) and the individual is unable to pay such fee in installments. Section 418 also clarifies that section 1930, as amended, does not prevent a district or bankruptcy court from waiving other fees for creditors and debtors, if in accordance with Judicial Conference policy.

Sec. 419. More Complete Information Regarding Assets of the Estate. Section 419 of the Act directs the Judicial Conference of the United States, after consideration of the views of the Director of the Executive Office for United States Trustees, to propose official rules and forms directing chapter 11 debtors to disclose information concerning the value, operations, and profitability of any closely held corporation, partnership, or other entity in which the debtor holds a substantial or controlling interest. Section 419 is intended to ensure that the debtor's interest in any of these entities is used for the payment of allowed claims against debtor.

Subtitle B. Small Business Bankruptcy Provisions

Sec. 431. Flexible Rules for Disclosure Statement and Plan. Section 431 of the Act amends section 1125 of the Bankruptcy Code to streamline the disclosure statement process and to provide for more flexibility. Section 431(1) amends section 1125(a)(1) of the Bankruptcy Code to require a bankruptcy court, in determining whether a disclosure statement supplies adequate information, to consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing such additional information. With regard to a small business case, section 431(2) amends section 1125(f) to permit the court to dispense with a disclosure statement if the plan itself supplies adequate information. In addition, it provides that the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28 of the United States Code. Further, section 431(2) provides that the court may conditionally approve a disclosure statement, subject to final approval after notice and a hearing, and allow the debtor to solicit acceptances of the plan based on such disclosure statement. The hearing on the disclosure statement may be combined with the confirmation hearing.

Sec. 432. Definitions. Section 432 of the Act amends section 101 of the Bankruptcy Code to define a

"small business case" as a chapter 11 case in which the debtor is a small business debtor. Section 432, in turn, defines a "small business debtor" as a person engaged in commercial or business activities (including an affiliate of such person that is also a debtor, but excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) having aggregate noncontingent, liquidated secured and unsecured debts of not more than $2 million (excluding debts owed to affiliates or insiders of the debtor) as of the date of the petition or the order for relief. This monetary definition applies only in a case where the United States trustee has not appointed a creditors' committee or where the court has determined that the creditors' committee is not sufficiently active and representative to provide effective oversight of the debtor. It does not apply to any member of a group of affiliated debtors that has aggregate noncontingent, liquidated secured and unsecured debts in excess of $2 million (excluding debts owed to one or more affiliates or insiders). This provision also requires this monetary figure to be periodically adjusted for inflation pursuant to section 104 of the Bankruptcy Code.

Sec. 433. Standard Form Disclosure Statement and Plan. Section 433 of the Act directs the Judicial Conference of the United States to propose for adoption standard form disclosure statements and reorganization plans for small business debtors. The provision requires the forms to achieve a practical balance between the needs of the court, case administrators, and other parties in interest to have reasonably complete information as well as the debtor's need for economy and simplicity.

Sec. 434. Uniform National Reporting Requirements. Subsection (a) of section 434 of the Act adds a provision to the Bankruptcy Code mandating additional reporting requirements for small business debtors. It requires a small business debtor to file periodic financial reports and other documents containing the following information with respect to the debtor's business operations: (1) profitability; (2) reasonable approximations of projected cash receipts and disbursements; (3) comparisons of actual cash receipts and disbursements with projections in prior reports; (4) whether the debtor is complying with postpetition requirements pursuant to the Bankruptcy Code and Federal Rules of Bankruptcy Procedure; (5) whether the debtor is timely filing tax returns and other government filings; and (6) whether the debtor is paying taxes and other administrative expenses when due. In addition, the debtor must report on such other matters that are in the best interests of the debtor and the creditors and in the public interest. If the debtor is not in compliance with any postpetition requirements pursuant to the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, or is not filing tax returns or other required governmental filings, paying taxes and other administrative expenses when due, the debtor must report: (1) what the failures are, (2) how they will be cured; (3) the cost of their cure; and (4) when they will be cured. Section 434(b) specifies that the effective date of this provision is 60 days after the date on which the rules required under this provision are promulgated.

Sec. 435. Uniform Reporting Rules and Forms for Small Business Cases. Subsection (a) of section 435 of the Act directs the Judicial Conference of the United States to propose official rules and forms with respect to the periodic financial reports and other information that a small business debtor must file concerning its profitability, cash receipts and disbursements, filing of its tax returns, and payment of its taxes and other administrative expenses.

Section 435(b) requires the rules and forms to achieve a practical balance between the need for reasonably complete information by the bankruptcy court, United States trustee, creditors and other parties in interest, and the small business debtor's interest in having such forms be easy and inexpensive to complete. The forms should also be designed to help the small business debtor better understand its financial condition and plan its future.

Sec. 436. Duties in Small Business Cases. Section 436 of the Act is intended to implement greater administrative oversight and controls over small business chapter 11 cases, the provision requires a chapter 11 trustee or debtor to:

(1) file with a voluntary petition (or in an involuntary case, within seven days from the date of the order for relief) the debtor's most recent financial statements (including a balance sheet, statement of operations, cash flow statement, and Federal income tax return) or a statement explaining why such information is not available;
(2) attend, through its senior management personnel and counsel, meetings scheduled by the bankruptcy court or the United States trustee (including the initial debtor interview and meeting of creditors pursuant to section 341 of the Bankruptcy Code), unless the court waives this requirement after notice and a hearing upon a finding of extraordinary and compelling circumstances;
(3) timely file all requisite schedules and the statement of financial affairs, unless the court, after notice and a hearing, grants an extension of up to 30 days from the order of relief, absent extraordinary and compelling circumstances;
(4) file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;
(5) maintain insurance that is customary and appropriate for the industry, subject to section 363(c)(2);
(6) timely file tax returns and other required government filings;
(7) timely pay all administrative expense taxes (except for certain contested claims), subject to section 363(c)(2); and
(8) permit the United States trustee to inspect the debtor's business premises, books, and records at reasonable hours after appropriate prior written notice, unless notice is waived by the debtor.

Sec. 437. Plan Filing and Confirmation Deadlines. Section 437 of the Act amends section 1121(e) of the Bankruptcy Code with respect to the period of time within which a small business debtor must file and confirm a plan of reorganization. This provision provides that a small business debtor's exclusive period to file a plan is 180 days from the date of the order for relief, unless the period is extended after notice and a hearing, or the court, for cause, orders otherwise. It further provides that a small business debtor must file a plan and any disclosure statement not later than 300 days after the order for relief. These time periods and the time fixed in section 1129(e) may be extended only if: (1) the debtor, after providing notice to parties in interest, demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time; (2) a new deadline is imposed at the time the extension is granted; and (3) the order granting such extension is signed before the expiration of the existing deadline.

Sec. 438. Plan Confirmation Deadline. Section 438 of the Act amends Bankruptcy Code section 1129 to require the court to confirm a plan not later than 45 days after it is filed if the plan complies with the applicable provisions of the Bankruptcy Code, unless this period is extended pursuant to section 1121(e)(3). Section 438 clarifies that the plan must otherwise comply with applicable provisions of the Bankruptcy Code and includes a cross-reference to section 1121(e)(3), as added by section 437 of this Act.

Sec. 439. Duties of the United States Trustee. Section 439 of the Act amends section 586(a) of title 28 of the United States Code to require the United States trustee to perform the following additional duties with respect to small business debtors:

(1) conduct an initial debtor interview before the meeting of creditors for the purpose of (a) investigating the debtor's viability, (b) inquiring about the debtor's business plan, (c) explaining the debtor's obligation to file monthly operating reports, (d) attempting to obtain an agreed scheduling order setting various time frames (such as the date for filing a plan and effecting confirmation), and (e) informing the debtor of other obligations;
(2) if determined to be appropriate and advisable, inspect the debtor's business premises for the purpose of reviewing the debtor's books and records and verifying that the debtor has filed its tax returns;
(3) review and monitor diligently the debtor's activities to determine as promptly as possible whether the debtor will be unable to confirm a plan; and
(4) promptly apply to the court for relief in any case in which the United States trustee finds material grounds for dismissal or conversion of the case.

Sec. 440. Scheduling Conferences. Section 440 amends section 105(d) of the Bankruptcy Code to mandate that a bankruptcy court hold status conferences as are necessary to further the expeditious and economical resolution of a bankruptcy case.

Sec. 441. Serial Filer Provisions. Paragraph (1) of section 441 of the Act amends section 362 of the Bankruptcy Code to provide that a court may award only actual damages for a violation of the automatic stay committed by an entity in the good faith belief that subsection (h) of section 362 (as amended) applies to the debtor. Section 441(2) adds a new subsection to section 362 of the Bankruptcy Code specifying that the automatic stay does not apply where the chapter 11 debtor: (1) is a debtor in a small business case pending at the time the subsequent case is filed; (2) was a debtor in a small business case dismissed for any reason pursuant to an order that became final in the two-year period ending on the date of the order for relief entered in the pending case; (3) was a debtor in small business case in which a plan was confirmed in the two-year period ending on the date of the order for relief entered in the pending case; or (4) is an entity that has acquired substantially all of the assets or business of a small business debtor described in the preceding paragraphs, unless such entity establishes by a preponderance of the evidence that it acquired the assets or business in good faith and not for the purpose of evading this provision.

An exception to this provision applies to a chapter 11 case that is commenced involuntarily and

involves no collusion between the debtor and the petitioning creditors. Also, it does not apply if the debtor proves by a preponderance of the evidence that: (1) the filing of the subsequent case resulted from circumstances beyond the debtor's control and which were not foreseeable at the time the prior case was filed; and (2) it is more likely than not that the court will confirm a feasible plan of reorganization (but not a liquidating plan) within a reasonable time.

Sec. 442. Expanded Grounds for Dismissal or Conversion and Appointment of Trustee. Subsection (a) of section 442 of the Act amends section 1112(b) of the Bankruptcy Code to mandate that the court convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, if the movant establishes cause, absent unusual circumstances. In this regard, the court must specify the circumstances that support the court's finding that conversion or dismissal is not in the best interests of creditors and the estate.

In addition, the provision specifies an exception to the provision's mandatory requirement applies if: (1) the debtor or a party in interest objects and establishes that there is a reasonable likelihood that a plan will be confirmed within the time period set forth in section 1121(e) and 1129(e), or if these provisions are inapplicable, within a reasonable period of time; (2) the grounds for granting such relief include an act or omission of the debtor for which there exists a reasonable justification for such act or omission; and (3) such act or omission will be cured within a reasonable period of time.

The court must commence the hearing on a section 1112(b) motion within 30 days of its filing and decide the motion not later than 15 days after commencement of the hearing unless the movant expressly consents to a continuance for a specified period of time or compelling circumstances prevent the court from meeting these time limits. Section 442 provides that the term "cause" under section 1112(b), as amended by this provision, includes the following:

(1) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
(2) gross mismanagement of the estate;
(3) failure to maintain appropriate insurance that poses a material risk to the estate or the public;
(4) unauthorized use of cash collateral that is harmful to one or more creditors;
(5) failure to comply with a court order;
(6) unexcused failure to timely satisfy any filing or reporting requirement under the Bankruptcy Code or applicable rule;
(7) failure to attend the section 341 meeting of creditors or an examination pursuant to rule 2004 of the Federal Rules of Bankruptcy Procedure, without good cause shown by the debtor;
(8) failure to timely provide information or to attend meetings reasonably requested by the United States trustee or bankruptcy administrator;
(9) failure to timely pay taxes owed after the order for relief or to file tax returns due postpetition;
(10) failure to file a disclosure statement or to confirm a plan within the time fixed by the

Bankruptcy Code or pursuant to court order;

(11) failure to pay any requisite fees or charges under chapter 123 of title 28 of the United States Code;

(12) revocation of a confirmation order;

(13) inability to effectuate substantial consummation of a confirmed plan;

(14) material default by the debtor with respect to a confirmed plan;

(15) termination of a plan by reason of the occurrence of a condition specified in the plan; and

(16) the debtor's failure to pay any domestic support obligation that first becomes payable postpetition

Section 442(b) creates additional grounds for the appointment of a chapter 11 trustee under section 1104(a). It provides that should the bankruptcy court determine cause exists to convert or dismiss a chapter 11 case, it may appoint a trustee or examiner if in the best interests of creditors and the bankruptcy estate.

Sec. 443. Study of Operation of Title 11, United States Code, with Respect to Small Businesses. Section 443 of the Act directs the Administrator of the Small Business Administration, in consultation with the Attorney General, the Director of the Executive Office for United States Trustees, and the Director of the Administrative Office of the United States Courts, to conduct a study to determine: (1) the internal and external factors that cause small businesses (particularly sole proprietorships) to seek bankruptcy relief and the factors that cause small businesses to successfully complete their chapter 11 cases; and (2) how the bankruptcy laws may be made more effective and efficient in assisting small business to remain viable.

Sec. 444. Payment of Interest. Paragraph (1) of section 444 of the Act amends section 362(d)(3) of the Bankruptcy Code to require a court to grant relief from the automatic stay within 30 days after it determines that a single asset real estate debtor is subject to this provision. Section 444(2) amends section 362(d)(3)(B) to specify that relief from the automatic stay shall be granted unless the single asset real estate debtor has commenced making monthly payments to each creditor secured by the debtor's real property (other than a claim secured by a judgment lien or unmatured statutory lien) in an amount equal to the interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate. It allows a debtor in its sole discretion to make the requisite interest payments out of rents or other proceeds generated by the real property, notwithstanding section 363(c)(2).

Sec. 445. Priority for Administrative Expenses. Section 445 of the Act amends section 503(b) of the Bankruptcy Code to add a new administrative expense priority for a nonresidential real property lease that is assumed under section 365 and then subsequently rejected. The amount of the priority is the sum of all monetary obligations due under the lease (excluding penalties and obligations arising from or relating to a failure to operate) for the two-year period following the rejection date or actual turnover of the premises (whichever is later), without reduction or setoff for any reason, except for sums actually received or to be received from a nondebtor. Any remaining sums due for the balance of the term of

the lease are treated as a claim under section 502(b)(6) of the Bankruptcy Code.

Sec. 446. Duties with Respect to a Debtor Who Is a Plan Administrator of an Employee Benefit Plan. Subsection (a) of section 446 of the Act amends Bankruptcy Code section 521(a) to require a debtor, unless a trustee is serving in the case, to serve as the administrator (as defined in the Employee Retirement Income Security Act) of an employee benefit plan if the debtor served in such capacity at the time the case was filed. Section 446(b) amends Bankruptcy Code section 704 to require the chapter 7 trustee to perform the obligations of such administrator in a case where the debtor or an entity designated by the debtor was required to perform such obligations. Section 446(c) amends Bankruptcy Code section 1106(a) to require a chapter 11 trustee to perform these obligations.

Sec. 447. Appointment of Committee of Retired Employees. This provision amends section 1114(d) of the Bankruptcy Code to clarify that it is the responsibility of the United States trustee to appoint members to a committee of retired employees.

TITLE V. MUNICIPAL BANKRUPTCY PROVISIONS

Sec. 501. Petition and Proceedings Related to Petition. Section 501 amends sections 921(d) and 301 of the Bankruptcy Code to clarify that the court must enter the order for relief in a chapter 9 case.

Sec. 502. Applicability of Other Sections to Chapter 9. Section 502 of the of the Act amends section 901 of the Bankruptcy Code to make the following sections applicable to chapter 9 cases:

(1) section 555 (contractual right to liquidate, terminate or accelerate a securities contract);
(2) section 556 (contractual right to liquidate, terminate or accelerate a commodities or forward contract);
(3) section 559 (contractual right to liquidate, terminate or accelerate a repurchase agreement);
(4) section 560 (contractual right to liquidate, terminate or accelerate a swap agreement);
(5) section 561 (contractual right to liquidate, terminate, accelerate, or offset under a master netting agreement and across contracts); and
(6) section 562 (damage measure in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, or master netting agreement).

TITLE VI. BANKRUPTCY DATA

Sec. 601. Improved Bankruptcy Statistics. This provision amends chapter 6 of title 28 of the United States Code to require the clerk for each district (or the bankruptcy court clerk if one has been certified pursuant to section 156(b) of title 28 of the United States Code) to collect certain statistics for chapter 7, 11, and 13 cases in a standardized format prescribed by the Director of the Administrative Office of the United States Courts and to make this information available to the public. Not later than July 1, 2008, the Director must submit a report to Congress concerning the statistical information collected and then must report annually thereafter. The statistics must be itemized by chapter of the Bankruptcy

Code and be presented in the aggregate for each district. The specific categories of information that must be gathered include the following:

(1) scheduled total assets and liabilities of debtors who are individuals with primarily consumer debts under chapters 7, 11 and 13 by category;
(2) such debtors' current monthly income, average income, and average expenses;
(3) the aggregate amount of debts discharged during the reporting period based on the difference between the total amount of scheduled debts and by categories that are predominantly nondischargeable;
(4) the average time between the filing of the bankruptcy case and the closing of the case;
(5) the number of cases in which reaffirmation agreements were filed, the total number of reaffirmation agreements filed, the number of cases in which the debtor was *pro se* and a reaffirmation agreement was filed, and the number of cases in which the reaffirmation agreement was approved by the court;
(6) for chapter 13 cases, information on the number of: (a) orders determining the value of secured property in an amount less than the amount of the secured claim, (b) final orders that determined the value of property securing a claim, (c) cases dismissed, (d) cases dismissed for failure to make payments under the plan, (e) cases refiled after dismissal, (f) cases in which the plan was completed (separately itemized with respect to the number of modifications made before completion of the plan, and (g) cases in which the debtor had previously sought bankruptcy relief within the six years preceding the filing of the present case;
(7) the number of cases in which creditors were fined for misconduct and the amount of any punitive damages awarded for creditor misconduct; and
(8) the number of cases in which sanctions under rule 9011 of the Federal Rules of Bankruptcy Procedure were imposed against a debtor's counsel and the damages awarded under this rule.

Section 601 provides that the amendments in this provision take effect 18 months after the date of enactment of this Act.

Sec. 602. Uniform Rules for the Collection of Bankruptcy Data. Section 602 of the Act amends chapter 39 of title 28 of the United States Code to require the Attorney General to promulgate rules mandating the establishment of uniform forms for final reports in chapter 7, 12 and 13 cases and periodic reports in chapter 11 cases. This provision also specifies that these reports be designed to facilitate compilation of data and to provide maximum public access by physical inspection at one or more central filing locations and by electronic access through the Internet or other appropriate media. The information should enable an evaluation of the efficiency and practicality of the bankruptcy system. In issuing rules, the Attorney General must consider: (1) the reasonable needs of the public for information about the Federal bankruptcy system; (2) the economy, simplicity, and lack of undue burden on persons obligated to file the reports; and (3) appropriate privacy concerns and safeguards.

Section 602 provides that final reports by trustees in chapter 7, 12, and 13 cases include the following information: (1) the length of time the case was pending; (2) assets abandoned; (3) assets exempted; (4) receipts and disbursements of the estate; (5) administrative expenses, including those

associated with section 707(b) of the Bankruptcy Code, and the actual costs of administering chapter 13 cases; (6) claims asserted; (7) claims allowed; and (8) distributions to claimants and claims discharged without payment. With regard to chapter 11 cases, section 602 provides that periodic reports include the following information regarding:

(1) the industry classification for businesses conducted by the debtor, as published by the Department of Commerce;
(2) the length of time that the case was pending;
(3) the number of full-time employees as of the date of the order for relief and at the end of each reporting period;
(4) cash receipts, cash disbursements, and profitability of the debtor for the most recent period and cumulatively from the date of the order for relief;
(5) the debtor's compliance with the Bankruptcy Code, including whether tax returns have been filed and taxes have been paid;
(6) professional fees approved by the court for the most recent period and cumulatively from the date of the order for relief; and
(7) plans filed and confirmed, including the aggregate recoveries of holders by class and as a percentage of total claims of an allowed class.

Sec. 603. Audit Procedures. Subsection (a)(1) of section 603 of the Act requires the Attorney General (for judicial districts served by United States trustees) and the Judicial Conference of the United States (for judicial districts served by bankruptcy administrators) to establish procedures to determine the accuracy, veracity, and completeness of petitions, schedules and other information filed by debtors pursuant to sections 111, 521 and 1322 of the Bankruptcy Code. Section 603(a)(1) requires the audits to be conducted in accordance with generally accepted auditing standards and performed by independent certified public accountants or independent licensed public accountants. It permits the Attorney General and the Judicial Conference to develop alternative auditing standards not later than two years after the date of enactment of this Act. Section 603(a)(2) requires these procedures to: (1) establish a method of selecting appropriate qualified contractors to perform these audits; (2) establish a method of randomly selecting cases for audit, and that a minimum of at least one case out of every 250 cases be selected for audit; (3) require audits in cases where the schedules of income and expenses reflect greater than average variances from the statistical norm for the district if they occur by reason of higher income or higher expenses than the statistical norm in which the schedules were filed; and (4) require the aggregate results of such audits, including the percentage of cases by district in which a material misstatement of income or expenditures is reported, to be made available to the public on an annual basis.

Section 603(b) amends section 586 of title 28 of the United States Code to require the United States trustee to submit reports as directed by the Attorney General, including the results of audits performed under section 603(a). In addition, it authorizes the United States trustee to contract with auditors to perform the audits specified in this provision. Further, it requires the report of each audit to be filed with the court and transmitted to the United States trustee. The report must specify material misstatements of income, expenditures or assets. In a case where a material misstatement has been

reported, the clerk must provide notice of such misstatement to creditors and the United States trustee must report it to the United States Attorney, if appropriate, for possible criminal prosecution. If advisable, the United States trustee must also take appropriate action, such as revoking the debtor's discharge.

Section 603(c) amends section 521 of the Bankruptcy Code to make it a duty of the debtor to cooperate with an auditor. Section 603(d) amends section 727 of the Bankruptcy Code to add, as a ground for revocation of a chapter 7 discharge the debtor's failure to: (a) satisfactorily explain a material misstatement discovered as the result of an audit pursuant to this provision; or (b) make available for inspection all necessary documents or property belonging to the debtor that are requested in connection with such audit. Section 603(e) provides that the amendments made by this provision take effect 18 months after the Act's date of enactment.

Sec. 604. Sense of Congress Regarding Availability of Bankruptcy Data. Section 604 expresses a sense of the Congress that it is a national policy of the United States that all data collected by bankruptcy clerks in electronic form (to the extent such data relates to public records pursuant to section 107 of the Bankruptcy Code) should be made available to the public in a useable electronic form in bulk, subject to appropriate privacy concerns and safeguards as determined by the Judicial Conference of the United States. It also states that a uniform bankruptcy data system should be established that uses a single set of data definitions and forms to collect such data and that data for any particular bankruptcy case should be aggregated in electronic format.

TITLE VII. BANKRUPTCY TAX PROVISIONS

Sec. 701. Treatment of Certain Tax Liens. Subsection (a) of section 701 of the Act makes several amendments to section 724 of the Bankruptcy Code to provide greater protection for holders of *ad valorem* tax liens on real or personal property of the estate. Many school boards obtain liens on real property to ensure collection of unpaid *ad valorem* taxes. Under current law, local governments are sometimes unable to collect these taxes despite the presence of a lien because they may be subordinated to certain claims and expenses as a result of section 724. Section 701(a) is intended to protect the holders of these tax liens from, among other things, erosion of their claims' status by expenses incurred under chapter 11 of the Bankruptcy Code. Pursuant to section 701(a), subordination of *ad valorem* tax liens is still possible under section 724(b), but limited to the payment of : (1) claims incurred under chapter 7 for wages, salaries, or commissions (but not expenses incurred under chapter 11); (2) claims for wages, salaries, and commissions entitled to priority under section 507(a)(4); and (3) claims for contributions to employee benefit plans entitled to priority under section 507(a)(5). Before a tax lien on real or personal property may be subordinated pursuant to section 724, the chapter 7 trustee must exhaust all other unencumbered estate assets and, consistent with section 506, recover reasonably necessary costs and expenses of preserving or disposing of such property.

Section 701(b) amends section 505(a)(2) of the Bankruptcy Code to prevent a bankruptcy court from determining the amount or legality of an *ad valorem* tax on real or personal property if the

applicable period for contesting or redetermining the amount of the claim under nonbankruptcy law has expired.

Sec. 702. Treatment of Fuel Tax Claims. Section 702 of the Act amends section 501 of the Bankruptcy Code to simplify the process for filing of claims by states for certain fuel taxes. Rather than requiring each state to file a claim for these taxes (as is the case under current law), section 702 permits the designated "base jurisdiction" under the International Fuel Tax Agreement to file a claim on behalf of all states, which would then be allowed as a single claim.

Sec. 703. Notice of Request for a Determination of Taxes. Under current law, a trustee or debtor in possession may request a governmental unit to determine administrative tax liabilities in order to receive a discharge of those liabilities. There are no requirements as to the content or form of such notice to the government. Section 703 of the Act amends section 505(b) of the Bankruptcy Code to require the clerk of each district to maintain a list of addresses designated by governmental units for service of section 505 requests. In addition, the list may also include information concerning filing requirements specified by such governmental units. If a governmental entity does not designate an address and provide that address to the bankruptcy court clerk, any request made under section 505(b) of the Bankruptcy Code may be served at the address of the appropriate taxing authority of that governmental unit.

Sec. 704. Rate of Interest on Tax Claims. Under current law, there is no uniform rate of interest applicable to tax claims. As a result, varying standards have been used to determine the applicable rate. Section 704 of the Act amends the Bankruptcy Code to add section 511 for the purpose of simplifying the interest rate calculation. It provides that for all tax claims (federal, state, and local), including administrative expense taxes, the interest rate shall be determined in accordance with applicable nonbankruptcy law. With respect to taxes paid under a confirmed plan, the rate of interest is determined as of the calendar month in which the plan is confirmed.

Sec. 705. Priority of Tax Claims. Under current law, a tax claim is entitled to be treated as a priority claim if it arises within certain specified time periods. In the case of income taxes, a priority arises, among other time periods, if the tax return was due within three years of the filing of the bankruptcy petition or if the assessment of the tax was made within 240 days of the filing of the petition. The 240-day period is tolled during the time that an offer in compromise is pending (plus 30 days). Though the statute is silent, most courts have also held that the three-year and 240-day time periods are tolled during the pendency of a previous bankruptcy case. Section 705 amends section 507(a)(8) of the Bankruptcy Code to codify the rule tolling priority periods during the pendency of a previous bankruptcy case during that 240-day period together with an additional 90 days. It also includes tolling provisions to adjust for the collection due process rights provided by the Internal Revenue Service Restructuring and Reform Act of 1998. During any period in which the government is prohibited from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken against the debtor, the priority is tolled, plus 90 days. Also, during any time in which there was a stay of proceedings in a prior bankruptcy case or collection of an income tax was precluded by a confirmed bankruptcy plan, the priority is tolled, plus 90 days.

Sec. 706. Priority Property Taxes Incurred. Under current law, many provisions of the Bankruptcy Code are keyed to the word "assessed." While this term has an accepted meaning in the federal system, it is not used in many state and local statutes and has created some confusion. To eliminate this problem with respect to real property taxes, section 706 amends section 507(a)(8)(B) of the Bankruptcy Code by replacing the word "assessed" with "incurred."

Sec. 707. No Discharge of Fraudulent Taxes in Chapter 13. Under current law, a debtor's ability to discharge tax debts varies depending on whether the debtor is in chapter 7 or chapter 13. In a chapter 7 case, taxes from a return due within three years of the petition date, taxes assessed within 240 days, or taxes related to an unfiled return or false return are not dischargeable. Chapter 13, on the other hand, allows these obligations to be discharged. Section 707 of the Act amends Bankruptcy Code section 1328(a)(2) to prohibit the discharge of tax claims described in section 523(a)(1)(B) and (C) as well as claims for a tax required to be collected or withheld and for which the debtor is liable in whatever capacity pursuant to section 507(a)(8)(C).

Sec. 708. No Discharge of Fraudulent Taxes in Chapter 11. Under current law, the confirmation of a chapter 11 plan discharges a corporate debtor from most debts. Section 708 amends section 1141(d) of the Bankruptcy Code to except from discharge in corporate chapter 11 case a debt specified in subsections 523(a)(2)(A) and (B) of the Bankruptcy Code owed to a domestic governmental unit. In addition, it excepts from discharge a debt owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 of the United States Code or any similar state statute. Section 708 excepts from discharge a debt for a tax or customs duty with respect to which the debtor made a fraudulent tax return or willfully attempted in any manner to evade or defeat such tax.

Sec. 709. Stay of Tax Proceedings Limited to Prepetition Taxes. Under current law, the filing of a petition for relief under the Bankruptcy Code activates an automatic stay that enjoins the commencement or continuation of a case in the federal tax court. This rule was arguably extended in *Halpern v. Commissioner*,[17] which held that the tax court did not have jurisdiction to hear a case involving a postpetition year. To address this issue, section 709 of the Act amends section 362(a)(8) of the Bankruptcy Code to specify that the automatic stay is limited to an individual debtor's prepetition taxes (taxes incurred before entering bankruptcy). The amendment clarifies that the automatic stay does not apply to an individual debtor's postpetition taxes. In addition, section 709 allows the bankruptcy court to determine whether the automatic stay applies to the postpetition tax liabilities of a corporate debtor.

Sec. 710. Periodic Payment of Taxes in Chapter 11 Cases. Section 710 of the Act amends section 1129(a)(9) of the Bankruptcy Code to provide that the allowed amount of priority tax claims (as of the plan's effective date) must be paid in regular cash installments within five years from the entry of the order for relief. The manner of payment may not be less favorable than that accorded the most favored

[17] 96 T.C. 895 (1991).

nonpriority unsecured class of claims under section 1122(b). In addition, it requires the same payment treatment to be accorded to secured section 507(a)(8) claims of a governmental unit.

Sec. 711. Avoidance of Statutory Liens Prohibited. The Internal Revenue Code gives special protections to certain purchasers of securities and motor vehicles notwithstanding the existence of a filed tax lien. Section 711 of the Act amends section 545(2) of the Bankruptcy Code to prevent that provision's special protections from being used to avoid an otherwise valid lien. Specifically, it prevents the avoidance of unperfected liens against a bona fide purchaser, if the purchaser qualifies as such under section 6323 of the Internal Revenue Code or a similar provision under state or local law.

Sec. 712. Payment of Taxes in the Conduct of Business. Although current law generally requires trustees and receivers to pay taxes in the ordinary course of the debtor's business, the payment of administrative expenses must first be authorized by the court. Section 712(a) of the Act amends section 960 of title 28 of the United States Code to clarify that postpetition taxes in the ordinary course of business must be paid on or before when such tax is due under applicable nonbankruptcy law, with certain exceptions. This requirement does not apply if the obligation is a property tax secured by a lien against property that is abandoned under section 554 within a reasonable time after the lien attaches. In addition, the requirement does not pertain where the payment is excused under the Bankruptcy Code. With respect to chapter 7 cases, section 712(a) provides that the payment of a tax claim may be deferred until final distribution pursuant to section 726 if the tax was not incurred by a chapter 7 trustee or if the court, prior to the due date of the tax, finds that the estate has insufficient funds to pay all administrative expenses in full. Section 712(b) amends section 503(b)(1)(B)(i) of the Bankruptcy Code to clarify that this provision applies to secured as well as unsecured tax claims, including property taxes based on liability that is *in rem*, *in personam* or both. Section 712(c) amends section 503(b)(1) to exempt a governmental unit from the requirement to file a request for payment of an administrative expense. Section 712(d)(1) amends section 506(b) to provide that to the extent that an allowed claim is oversecured, the holder is entitled to interest and any reasonable fees, costs, or charges provided for under state law. Section 712(d)(2), in turn, amends section 506(c) to permit a trustee to recover from a secured creditor the payment of all *ad valorem* property taxes.

Sec. 713. Tardily Filed Priority Tax Claims. Section 713 of the Act amends section 726(a)(1) of the Bankruptcy Code to require a claim under section 507 that is not timely filed pursuant to section 501 to be entitled to a distribution if such claim is filed the earlier of the date that is ten days following the mailing to creditors of the summary of the trustee's final report or before the trustee commences final distribution.

Sec. 714. Income Tax Returns Prepared by Tax Authorities. Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return filed on behalf of a taxpayer who has provided information sufficient to complete a return constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer based on information the Secretary obtains through testimony or otherwise does not constitute filing a return (and the debt cannot be discharged).

Sec. 715. Discharge of the Estate's Liability for Unpaid Taxes. Under the Bankruptcy Code, a trustee

or debtor in possession may request a prompt audit to determine postpetition tax liabilities. If the government does not make a determination or request an extension of time to audit, then the trustee or debtor in possession's determination of taxes will be final. Several court cases have held that while this protects the debtor and the trustee, it does not necessarily protect the estate. Section 715 of the Act amends section 505(b) of the Bankruptcy Code to clarify that the estate is also protected if the government does not request an audit of the debtor's tax returns. Therefore, if the government does not make a determination of postpetition tax liabilities or request extension of time to audit, then the estate's liability for unpaid taxes is discharged.

Sec. 716. Requirement to File Tax Returns to Confirm Chapter 13 Plans. Under current law, a debtor may enjoy the benefits of chapter 13 even if delinquent in the filing of tax returns. Section 716 of the Act responds to this problem. Subsection (a) amends section 1325(a) of the Bankruptcy Code to require a chapter 13 debtor to file all applicable Federal, state, and local tax returns as a condition of confirmation as required by section 1308 (as added by section 716(b)). Section 716(b) adds section 1308 to chapter 13 to require a chapter 13 debtor to be current on the filing of tax returns for the four-year period preceding the filing of the case. If the returns are not filed by the date on which the meeting of creditors is first scheduled, the trustee may hold open that meeting for a reasonable period of time to allow the debtor to file any unfiled returns. The additional period of time may not extend beyond 120 days after the date of the meeting of the creditors or beyond the date on which the return is due under the last automatic extension of time for filing. The debtor, however, may obtain an extension of time from the court if the debtor demonstrates by a preponderance of the evidence that the failure to file was attributable to circumstances beyond the debtor's control.

Section 716(c) amends section 1307 of the Bankruptcy Code to provide that if a chapter 13 debtor fails to file a tax return as required by section 1308, the court must dismiss the case or convert it to one under chapter 7 (whichever is in the best interests of creditors and the estate) on request of a party in interest or the United States trustee after notice and a hearing.

Section 716(d) amends section 502(b)(9) of the Bankruptcy Code to provide that in a chapter 13 case, a governmental unit's tax claim based on a return filed under section 1308 shall be deemed to be timely filed if the claim is filed within 60 days from the date on which such return is filed. Section 716(e) states the sense of the Congress that the Judicial Conference of the United States should propose for adoption official rules with respect an objection by a governmental unit to confirmation of a chapter 13 plan when such claim pertains to a tax return filed pursuant to section 1308.

Sec. 717. Standards for Tax Disclosure. Before creditors and stockholders may be solicited to vote on a chapter 11 plan, the plan proponent must file a disclosure statement that provides adequate information to holders of claims and interests so they can make a decision as to whether or not to vote in favor of the plan. As the tax consequences of a plan can have a significant impact on the debtor's reorganization prospects, section 717 amends section 1125(a) of the Bankruptcy Code to require that a chapter 11 disclosure statement discuss the plan's potential material federal tax consequences to the debtor, any successor to the debtor, and to a hypothetical investor that is representative of the claimants and interest holders in the case.

Sec. 718. Setoff of Tax Refunds. Under current law, the filing of a bankruptcy petition automatically stays the setoff of a prepetition tax refund against a prepetition tax obligation unless the bankruptcy court approves the setoff. Interest and penalties that may continue to accrue may also be nondischargeable pursuant to section 523(a)(1) of the Bankruptcy Code and cause individual debtors undue hardship. Section 718 of the Act amends section 362(b) of the Bankruptcy Code to create an exception to the automatic stay whereby such setoff could occur without court order unless it would not be permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of the tax liability. In that circumstance, the governmental authority may hold the refund pending resolution of the action, unless the court, on motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection pursuant to section 361.

Sec. 719. Special Provisions Related to the Treatment of State and Local Taxes. Section 719 of the Act conforms state and local income tax administrative issues to the Internal Revenue Code. For example, under federal law, a bankruptcy petitioner filing on March 5 has two tax years (January 1 to March 4, and March 5 to December 31). Under the Bankruptcy Code, however, state and local tax years are divided differently (January 1 to March 5, and March 6 to December 31). Section 719 requires the states to follow the federal convention. It conforms state and local tax administration to the Internal Revenue Code in the following areas: division of tax liabilities and responsibilities between the estate and the debtor, tax consequences with respect to partnerships and transfers of property, and the taxable period of a debtor. Section 719 does not conform state and local tax rates to federal tax rates.

Sec. 720. Dismissal for Failure to Timely File Tax Returns. Under existing law, there is no definitive rule with respect to whether a bankruptcy court may dismiss a bankruptcy case if the debtor fails to file returns for taxes incurred postpetition. Section 720 of the Act amends section 521 of the Bankruptcy Code to allow a taxing authority to request that the court dismiss or convert a bankruptcy case if the debtor fails to file a postpetition tax return or obtain an extension. If the debtor does not file the required return or obtain the extension within 90 days from the time of the request by the taxing authority to file the return, the court must convert or dismiss the case, whichever is in the best interest of creditors and the estate.

TITLE VIII. ANCILLARY AND OTHER CROSS-BORDER CASES.

Title VIII of the Act adds a new chapter to the Bankruptcy Code for transnational bankruptcy cases. It incorporates the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases. Title VIII is intended to provide greater legal certainty for trade and investment as well as to provide for the fair and efficient administration of cross-border insolvencies, which protects the interests of creditors and other interested parties, including the debtor. In addition, it serves to protect and maximize the value of the debtor's assets.

Sec. 801. Amendment to Add Chapter 15 to Title 11, United States Code. Section 801 introduces chapter 15 to the Bankruptcy Code, which is the Model Law on Cross-Border Insolvency ("Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") at its Thirtieth Session on May 12-30, 1997.[18] Cases brought under chapter 15 are intended to be ancillary to cases brought in a debtor's home country, unless a full United States bankruptcy case is brought under another chapter. Even if a full case is brought, the court may decide under section 305 to stay or dismiss the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter.[19] If the full case is not dismissed, it will be subject to the provisions of this chapter governing cooperation, communication and coordination with the foreign courts and representatives. In any case, an order granting recognition is required as a prerequisite to the use of sections 301 and 303 by a foreign representative.

Sec. 1501. Purpose and scope of application. Section 1501 combines the Preamble to the Model Law (subsection (1)) with its article 1 (subsections (2) and (3))[20]. It largely tracks the language of the Model Law with appropriate United States references. However, it adds in subsection (3) an exclusion of certain natural persons who may be considered ordinary consumers. Although the consumer exclusion is not in the text of the Model Law, the discussions at UNCITRAL recognized that such exclusion would be necessary in countries like the United States where there are special provisions for consumer debtors in the insolvency laws.[21]

The reference to section 109(e) essentially defines "consumer debtors" for purposes of the exclusion by incorporating the debt limitations of that section, but not its requirement of regular income. The exclusion adds a requirement that the debtor or debtor couple be citizens or long-term legal residents of the United States. This ensures that residents of other countries will not be able to manipulate this exclusion to avoid recognition of foreign proceedings in their home countries or elsewhere.

The first exclusion in subsection (c) constitutes, for the United States, the exclusion provided in

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[18]The text of the Model Law and the Report of UNCITRAL on its adoption are found at U.N. G.A., 52d Sess., Supp. No. 17 (A/52/17) ("Report"). That Report and the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Gen. Ass., UNCITRAL 30th Sess. U.N. Doc. A/CN.9/442 (1997) ("Guide"), which was discussed in the negotiations leading to the Model Law and published by UNCITRAL as an aid to enacting countries, should be consulted for guidance as to the meaning and purpose of its provisions. The development of the provisions in the negotiations at UNCITRAL, in which the United States was an active participant, is recounted in the interim reports of the Working Group that are cited in the Report.

[19]*See* section 1529 and commentary.

[20]Guide at 16-19.

[21]*See id.* at 18, ¶60; 19 ¶66.

article 1, subsection (2), of the Model Law.[22] Foreign representatives of foreign proceedings which are excluded from the scope of chapter 15 may seek comity from courts other than the bankruptcy court since the limitations of section 1509(b)(2) and (3) would not apply to them.

The reference to section 109(b) interpolates into chapter 15 the entities governed by specialized insolvency regimes under United States law which are currently excluded from liquidation proceedings under title 11. Section 1501 contains an exception to the section 109(b) exclusions so that foreign proceedings of foreign insurance companies are eligible for recognition and relief under chapter 15 as they had been under section 304. However, section 1501(d) has the effect of leaving to State regulation any deposit, escrow, trust fund or the like posted by a foreign insurer under State law.

Sec. 1502. Definitions. "Debtor" is given a special definition for this chapter. This definition does not come from the Model Law, but is necessary to eliminate the need to refer repeatedly to "the same debtor as in the foreign proceeding." With certain exceptions, the term "person" used in the Model Law has been replaced with "entity," which is defined broadly in section 101(15) to include natural persons and various legal entities, thus matching the intended breadth of the term "person" in the Model Law. The exceptions include contexts in which a natural person is intended and those in which the Model Law language already refers to both persons and entities other than persons. The definition of "trustee" for this chapter ensures that debtors in possession and debtors, as well as trustees, are included in the term.[23]

The definition of "within the territorial jurisdiction of the United States" in subsection (7) is not taken from the Model Law. It has been added because the United States, like some other countries, asserts insolvency jurisdiction over property outside its territorial limits under appropriate circumstances. Thus a limiting phrase is useful where the Model Law and this chapter intend to refer only to property within the territory of the enacting state. In addition, a definition of "recognition" supplements the Model Law definitions and merely simplifies drafting of various other sections of chapter 15.

Two key definitions of "foreign proceeding" and "foreign representative," are found in sections 101(23) and (24), which have been amended consistent with Model Law article 2.[24] The definitions of "establishment," "foreign court," "foreign main proceeding," and "foreign non-main proceeding" have been taken from Model Law article 2, with only minor language variations necessary to comport with

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[22] *Id.* at 17.

[23] *See* section 1505.

[24] Guide at 19-21, ¶¶67-68.

United States terminology. Additionally, defined terms have been placed in alphabetical order.[25] In order to be recognized as a foreign non-main proceeding, the debtor must at least have an establishment in that foreign country.[26]

Sec. 1503. International obligations of the United States. This section is taken exactly from the Model Law with only minor adaptations of terminology.[27] Although this section makes an international obligation prevail over chapter 15, the courts will attempt to read the Model Law and the international obligation so as not to conflict, especially if the international obligation addresses a subject matter less directly related than the Model Law to a case before the court.

Sec. 1504. Commencement of ancillary case. Article 4 of the Model Law is designed for designation of the competent court which will exercise jurisdiction under the Model Law. In United States law, section 1334(a) of title 28 gives exclusive jurisdiction to the district courts in a "case" under this title.[28] Therefore, since the competent court has been determined in title 28, this section instead provides that a petition for recognition commences a "case," an approach that also invokes a number of other useful procedural provisions. In addition, a new subsection (P) to section 157 of title 28 makes cases under this chapter part of the core jurisdiction of bankruptcy courts if referred by the district courts, thus completing the designation of the competent court. Finally, the particular bankruptcy court that will rule on the petition is determined pursuant to a revised section 1410 of title 28 governing venue and transfer.[29]

The title "ancillary" in this section and in the title of this chapter emphasizes the United States

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[25]*See* Guide at 19, (Model Law) 21 ¶75 (concerning establishment); 21 ¶74 (concerning foreign court); 21 ¶¶72, 73 and 75 (concerning foreign main and non-main proceedings).

[26]*See id.* at 21, ¶75.

[27]*See id.* at 22, Art. 3.

[28]*See id.* at 23, Art. 4.

[29]New section 1410 of title 28 provides as follows:

> A case under chapter 15 of title 11 may be commenced in the district court for the district --
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> (1) in which the debtor has its principal place of business or principal assets in the United States;
>
> (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding or enforcement of judgment in a Federal or State court; or
>
> (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties having regard to the relief sought by the foreign representative.

policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies (often called "secondary" proceedings) in each state where assets are found. Under the Model Law, notwithstanding the recognition of a foreign main proceeding, full bankruptcy cases are permitted in each country (see sections 1528 and 1529). In the United States, the court will have the power to suspend or dismiss such cases where appropriate under section 305.

Sec. 1505. Authorization to act in a foreign country. The language in this section varies from the wording of article 5 of the Model Law as necessary to comport with United States law and terminology. The slight alteration to the language in the last sentence is meant to emphasize that the identification of the trustee or other entity entitled to act is under United States law, while the scope of actions that may be taken by the trustee or other entity under foreign law is limited by the foreign law.[30]

The related amendment to section 586(a)(3) of title 28 makes acting pursuant to authorization under this section an additional power of a trustee or debtor in possession. While the Model Law automatically authorizes an administrator to act abroad, this section requires all trustees and debtors to obtain court approval before acting abroad. That requirement is a change from the language of the Model Law, but one that is purely internal to United States law.[31] Its main purpose is to ensure that the court has knowledge and control of possibly expensive activities, but it will have the collateral benefit of providing further assurance to foreign courts that the United States debtor or representative is under judicial authority and supervision. This requirement means that the first-day orders in reorganization cases should include authorization to act under this section where appropriate.

This section also contemplates the designation of an examiner or other natural person to act for the estate in one or more foreign countries where appropriate. One instance might be a case in which the designated person had a special expertise relevant to that assignment. Another might be where the foreign court would be more comfortable with a designated person than with an entity like a debtor in possession. Either are to be recognized under the Model Law.[32]

Sec. 1506. Public policy exception. This provision follows the Model Law article 5 exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world. The word "manifestly" in international usage restricts the public policy exception to the most fundamental policies of the United States.[33]

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[30] *See* Guide at 24.

[31] *See id.* at 24, Art. 5.

[32] *See id.* at 23-24, ¶82.

[33] *See id.* at 25.

Sec. 1507. Additional assistance. Subsection (1) follows the language of Model Law article 7.[34] Subsection (2) makes the authority for additional relief (beyond that permitted under sections 1519-1521, below) subject to the conditions for relief heretofore specified in United States law under section 304, which is repealed. This section is intended to permit the further development of international cooperation begun under section 304, but is not to be the basis for denying or limiting relief otherwise available under this chapter. The additional assistance is made conditional upon the court's consideration of the factors set forth in the current subsection 304(c) in a context of a reasonable balancing of interests following current case law. The references to "estate" in section 304 have been changed to refer to the debtor's property, because many foreign systems do not create an estate in insolvency proceedings of the sort recognized under this chapter. Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.[35]

Sec. 1508. Interpretation. This provision follows conceptually Model Law article 8 and is a standard one in recent UNCITRAL treaties and model laws. Changes to the language were made to express the concepts more clearly in United States vernacular.[36] Interpretation of this chapter on a uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well. Uniform interpretation will also be aided by reference to CLOUT, the UNCITRAL Case Law On Uniform Texts, which is a service of UNCITRAL. CLOUT receives reports from national reporters all over the world concerning court decisions interpreting treaties, model laws, and other text promulgated by UNCITRAL. Not only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation. To the extent that the United States courts rely on these sources, their decisions will more likely be regarded as persuasive elsewhere.

Sec. 1509. Right of direct access. This section implements the purpose of article 9 of the Model Law, enabling a foreign representative to commence a case under this chapter by filing a petition directly with the court without preliminary formalities that may delay or prevent relief. It varies the language to fit United States procedural requirements and it imposes recognition of the foreign proceeding as a condition to further rights and duties of the foreign representative. If recognition is granted, the foreign representative will have full capacity under United States law (subsection (b)(1)), may request such relief in a state or federal court other than the bankruptcy court (subsection (b)(2)), and may be granted comity or cooperation by such non-bankruptcy court (subsection (b)(3) and (c)).

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[34] *Id.* at 26.

[35] *Id.*

[36] *Id.* at 26, ¶91.

Subsections (b)(2), (b)(3), and (c) make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property. This section, therefore, completes for the United States the work of article 4 of the Model Law ("competent court") as well as article 9.[37]

Although a petition under current section 304 is the proper method for achieving deference by a United States court to a foreign insolvency under present law, some cases in state and federal courts under current law have granted comity suspension or dismissal of cases involving foreign proceedings without requiring a section 304 petition or even referring to the requirements of that section. Even if the result is correct in a particular case, the procedure is undesirable, because there is room for abuse of comity. Parties would be free to avoid the requirements of this chapter and the expert scrutiny of the bankruptcy court by applying directly to a state or federal court unfamiliar with the statutory requirements. Such an application could be made after denial of a petition under this chapter. This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.[38]

Subsection (d) has been added to ensure that a foreign representative cannot seek relief in courts in the United States after being denied recognition by the court under this chapter. Subsection (e) makes activities in the United States by a foreign representative subject to applicable United States law, just as 28 U.S.C. section 959 does for a domestic trustee in bankruptcy.[39] Subsection (f) provides a limited exception to the prior recognition requirement so that collection of a claim which is property of the debtor, for example an account receivable, by a foreign representative may proceed without commencement of a case or recognition under this chapter.

Sec. 1510. Limited jurisdiction. Section 1510, article 10 of the Model Law, is modeled on section 306 of the Bankruptcy Code. Although the language referring to conditional relief in section 306 is not included, the court has the power under section 1522 to attach appropriate conditions to any relief it may grant. Nevertheless, the authority in section 1522 is not intended to permit the imposition of jurisdiction over the foreign representative beyond the boundaries of the case under this chapter and any related actions the foreign representative may take, such as commencing a case under another chapter of this title.

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[37] *See id.* at 23, Art. 4, ¶¶79-83; 27 Art. 9, ¶93.

[38] *See id.* at 27, Art. 9; 34-35, Art. 15 and ¶¶116-119; 39-40, Art. 18, ¶¶133-134; *see also* sections 1515(3), 1518.

[39] *Id.* at 27, ¶93.

Sec. 1511. Commencement of Case Under Section 301 or 303. This section reflects the intent of article 11 of the Model Law, but adds language that conforms to United States law or that is otherwise necessary in the United States given its many bankruptcy court districts and the importance of full information and coordination among them.[40] Article 11 does not distinguish between voluntary and involuntary proceedings, but seems to have implicitly assumed an involuntary proceeding.[41] Subsection 1(a)(2) goes farther and permits a voluntary filing, with its much simpler requirements, if the foreign proceeding that has been recognized is a main proceeding.

Sec. 1512. Participation of a foreign representative in a case under this title. This section tracks article 12 of the Model Law with a slight alteration to tie into United States procedural terminology.[42] The effect of this section is to make the recognized foreign representative a party in interest in any pending or later commenced United States bankruptcy case.[43] Throughout this chapter, the word "case" has been substituted for the word "proceeding" in the Model Law when referring to cases under the United States Bankruptcy Code, to conform to United States usage.

Sec. 1513. Access of foreign creditors to a case under this title. This section mandates nondiscriminatory or "national" treatment for foreign creditors, except as provided in subsection (b) and section 1514. It follows the intent of Model Law article 13, but the language required alteration to fit into the Bankruptcy Code.[44] The law as to priority for foreign claims that fit within a class given priority treatment under section 507 (for example, foreign employees or spouses) is unsettled. This section permits the continued development of case law on that subject and its general principle of national treatment should be an important factor to be considered. At a minimum, under this section, foreign claims must receive the treatment given to general unsecured claims without priority, unless they are in a class of claims in which domestic creditors would also be subordinated.[45] The Model Law allows for an exception to the policy of nondiscrimination as to foreign revenue and other public law claims.[46] Such claims (such as tax and Social Security claims) have been traditionally denied enforcement in the United States, inside and outside of bankruptcy. The Bankruptcy Code is silent on this point, so the rule is purely a matter of traditional case law. It is not clear if this policy should be maintained or modified, so this section leaves this question to developing case law. It also allows the Department of

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[40] *See id.* at 28, Art. 11.

[41] *Id.* at 38, ¶¶97-99.

[42] *Id.* at 29, Art. 12.

[43] *Id*. at 29, ¶¶10-102.

[44] *Id*. at 30, ¶103.

[45] *See id.* at 30, ¶104.

[46] *See id.* at 31, ¶105.

the Treasury to negotiate reciprocal arrangements with our tax treaty partners in this regard, although it does not mandate any restriction of the evolution of case law pending such negotiations.

Sec. 1514. Notification of foreign creditors concerning a case under title 11. This section ensures that foreign creditors receive proper notice of cases in the United States.[47] As a "foreign creditor" is not a defined term, foreign addresses are used as the distinguishing factor. The Federal Rules of Bankruptcy Procedure ("Rules") should be amended to conform to the requirements of this section, including a special form for initial notice to such creditors. In particular, the Rules must provide additional time for such creditors to file proofs of claim where appropriate and require the court to make specific orders in that regard in proper circumstances. The notice must specify that secured claims must be asserted, because in many countries such claims are not affected by an insolvency proceeding and need not be filed.[48] If a foreign creditor has made an appropriate request for notice, it will receive notices in every instance where notices would be sent to other creditors who have made such requests. Subsection (d) replaces the reference to "a reasonable time period" in Model Law article 14(3)(a).[49] It makes clear that the Rules, local rules, and court orders must make appropriate adjustments in time periods and bar dates so that foreign creditors have a reasonable time within which to receive notice or take an action.

Sec. 1515. Application for recognition of a foreign proceeding. This section follows article 15 of the Model Law with minor changes.[50] The Rules will require amendment to provide forms for some or all of the documents mentioned in this section, to make necessary additions to Rules 1000 and 2002 to facilitate appropriate notices of the hearing on the petition for recognition, and to require filing of lists of creditors and other interested persons who should receive notices. Throughout the Model Law, the question of notice procedure is left to the law of the enacting state.[51]

Sec. 1516. Presumptions concerning recognition. This section follows article 16 of the Model Law with minor changes.[52] Although sections 1515 and 1516 are designed to make recognition as simple and expedient as possible, the court may hear proof on any element stated. The ultimate burden as to each element is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in section 1516. The word "proof" in subsection (3) has been changed to

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[47] *See* Model Law, Art. 14; Guide at 31-32, ¶¶106-109.

[48] Guide at 33, ¶111.

[49] *Id.* at 31, Art. 14(3)(a).

[50] *Id.* at 33.

[51] *See id.* at 36, ¶121.

[52] *Id.* at 36

"evidence" to make it clearer using United States terminology that the ultimate burden is on the foreign representative.[53] "Registered office" is the term used in the Model Law to refer to the place of incorporation or the equivalent for an entity that is not a natural person.[54] The presumption that the place of the registered office is also the center of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy.

Sec. 1517. Order granting recognition. This section closely tracks article 17 of the Model Law, with a few exceptions.[55] The decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) of the Bankruptcy Code. The requirements of this section, which incorporates the definitions in section 1502 and sections 101(23) and (24), are all that must be fulfilled to attain recognition. Reciprocity was specifically suggested as a requirement for recognition on more than one occasion in the negotiations that resulted in the Model Law. It was rejected by overwhelming consensus each time. The United States was one of the leading countries opposing the inclusion of a reciprocity requirement.[56] In this regard, the Model Law conforms to section 304, which has no such requirement.

The drafters of the Model Law understood that only a main proceeding or a non-main proceeding meeting the standards of section 1502 (that is, one brought where the debtor has an establishment) were entitled to recognition under this section. The Model Law has been slightly modified to make this point clear by referring to the section 1502 definition of main and non-main proceedings, as well as to the general definition of a foreign proceeding in section 101(23). A petition under section 1515 must show that proceeding is a main or a qualifying non-main proceeding in order to obtain recognition under this section.

Consistent with the position of various civil law representatives in the drafting of the Model Law, recognition creates a status with the effects set forth in section 1520, so those effects are not viewed as orders to be modified, as are orders granting relief under sections 1519 and 1521. Subsection (4) states the grounds for modifying or terminating recognition. On the other hand, the effects of recognition (found in section 1520 and including an automatic stay) are subject to modification under section 362(d), made applicable by section 1520(2), which permits relief from the automatic stay of section 1520 for cause.

Paragraph 1(d) of section 17 of the Model Law has been omitted as an unnecessary

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[53] *Id.* at 36, Art. 16(3).

[54] *Id.*

[55] *Id.* at 37.

[56] Report of the Working Group on Insolvency Law on the Work of Its Twentieth Session (Vienna, 7-18 Oct. 1996), at 6, ¶¶16-20.

requirement for United States purposes, because a petition submitted to the wrong court will be dismissed or transferred under other provisions of United States law.[57] The reference to section 350 refers to the routine closing of a case that has been completed and will invoke requirements including a final report from the foreign representative in such form as the Rules may provide or a court may order.[58]

Sec. 1518. Subsequent information. This section follows the Model Law, except to eliminate the word "same", which is rendered unnecessary by the definition of "debtor" in section 1502, and to provide for a formal document to be filed with the court.[59] Judges in several jurisdictions, including the United States, have reported a need for a requirement of complete and candid reports to the court of all proceedings, worldwide, involving the debtor. This section will ensure that such information is provided to the court on a timely basis. Any failure to comply with this section will be subject to the sanctions available to the court for violations of the statute. The section leaves to the Rules the form of the required notice and related questions of notice to parties in interest, the time for filing, and the like.

Sec. 1519. Relief may be granted upon petition for recognition of a foreign proceeding. This section generally follows article 19 of the Model Law.[60] The bankruptcy court will have jurisdiction to grant emergency relief under Rule 7065 pending a hearing on the petition for recognition. This section does not expand or reduce the scope of section 105 as determined by cases under section 105 nor does it modify the sweep of sections 555 to 560. Subsection (d) precludes injunctive relief against police and regulatory action under section 1519, leaving section 105 as the only avenue for such relief. Subsection (e) makes clear that this section contemplates injunctive relief and that such relief is subject to specific rules and a body of jurisprudence. Subsection (f) was added to complement amendments to the Bankruptcy Code provisions dealing with financial contracts.

Sec. 1520. Effects of recognition of a foreign main proceeding. In general, this chapter sets forth all the relief that is available as a matter of right based upon recognition hereunder, although additional assistance may be provided under section 1507 and this chapter have no effect on any relief currently available under section 105. The stay created by article 20 of the Model Law is imported to chapter 15 from existing provisions of the Code. Subsection (a)(1) combines subsections 1(a) and (b) of article 20 of the Model Law, because section 362 imposes the restrictions required by those two subsections as well as additional restrictions.[61]

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[57] Guide at 37, Art. 17(1)(d).

[58] *Id.*

[59] *Id.* at 39-40, ¶¶133, 134.

[60] *Id.* at 40.

[61] *Id.* at 42, Art. 20 1(a), (b).

Subsections (a)(2) and (4) apply the Bankruptcy Code sections that impose the restrictions called for by subsection 1(c) of the Model Law. In both cases, the provisions are broader and more complete than those contemplated by the Model Law, but include all the restraints the Model Law provisions would impose.[62] As the foreign proceeding may or may not create an "estate" similar to that created in cases under this title, the restraints are applicable to actions against the debtor under section 362(a) and with respect to the property of the debtor under the remaining sections. The only property covered by this section is property within the territorial jurisdiction of the United States as defined in section 1502. To achieve effects on property of the debtor which is not within the territorial jurisdiction of the United States, the foreign representative would have to commence a case under another chapter of this title.

By applying sections 361 and 362, subsection (a) makes applicable the United States exceptions and limitations to the restraints imposed on creditors, debtors, and other in a case under this title, as stated in article 20(2) of the Model Law.[63] It also introduces the concept of adequate protection provided in sections 362 and 363. These exceptions and limitations include those set forth in sections 362(b), (c) and (d). As a result, the court has the power to terminate the stay pursuant to section 362(d), for cause, including a failure of adequate protection.[64]

Subsection (a)(2), by its reference to sections 363 and 552 adds to the powers of a foreign representative of a foreign main proceeding an automatic right to operate the debtor's business and exercise the power of a trustee under sections 363 and 542, unless the court orders otherwise. A foreign representative of a foreign main proceeding may need to continue a business operation to maintain value and granting that authority automatically will eliminate the risk of delay. If the court is uncomfortable about this authority in a particular situation, it can "order otherwise" as part of the order granting recognition.

Two special exceptions to the automatic stay are embodied in subsections (b) and (c). To preserve a claim in certain foreign countries, it may be necessary to commence an action. Subsection (b) permits the commencement of such an action, but would not allow for its further prosecution. Subsection (c) provides that there is no stay of the commencement of a full United States bankruptcy case. This essentially provides an escape hatch through which any entity, including the foreign representative, can flee into a full case. The full case, however, will remain subject to subchapters IV and V on cooperation and coordination of proceedings and to section 305 providing for stay or dismissal. Section 108 of the Bankruptcy Code provides the tolling protection intended by Model Law article 20(3), so no exception is necessary for claims that might be extinguished under United States

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[62] *Id.* at 42, 45.

[63] *Id.* at 42, Art. 20(2); 44, ¶¶ 148, 150.

[64] *Id.* at 42, Art. 20(3); 44-45, ¶¶ 151 152.

law.[65]

Sec. 1521. Relief that may be granted upon recognition of a foreign proceeding. This section follows article 21 of the Model Law, with detailed changes to conform to United States law.[66] The exceptions in subsection (a)(7) relate to avoiding powers. The foreign representative's status as to such powers is governed by section 1523 below. The avoiding power in section 549 and the exceptions to that power are covered by section 1520(a)(2). The word "adequately" in the Model Law, articles 21(2) and 22(1), has been changed to "sufficiently" in sections 1521(b) and 1522(a) to avoid confusion with a very specialized legal term in United States bankruptcy, "adequate protection."[67] Subsection (c) is designed to limit relief to assets having some direct connection with a non-main proceeding, for example where they were part of an operating division in the jurisdiction of the non-main proceeding when they were fraudulently conveyed and then brought to the United States.[68] Subsections (d), (e) and (f) are identical to those same subsections of section 1519. This section does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304 nor does it modify the sweep of sections 555 through 560.

Sec. 1522. Protection of creditors and other interested persons. This section follows article 22 of the Model Law with changes for United States usage and references to relevant Bankruptcy Code sections.[69] It gives the bankruptcy court broad latitude to mold relief to meet specific circumstances, including appropriate responses if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors. For a response to a showing that the conditions necessary to recognition did not actually exist or have ceased to exist, see section 1517. Concerning the change of "adequately" in the Model Law to "sufficiently" in this section, see section 1521. Subsection (d) is new and simply makes clear that an examiner appointed in a case under chapter 15 shall be subject to certain duties and bonding requirements based on those imposed on trustees and examiners under other chapters of this title.

Sec. 1523. Actions to avoid acts detrimental to creditors. This section follows article 23 of the Model Law, with wording to fit it within procedure under this title.[70] It confers standing on a recognized foreign representative to assert an avoidance action but only in a pending case under

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[65] *Id.*

[66] *Id.* at 45-46, Art. 21.

[67] *Id.* at 46, Art. 21(2); 47, Art. 22(1).

[68] *See id.* at 46-47, ¶¶ 158, 160.

[69] *Id.* at 47.

[70] *Id.* at 48-49.

another chapter of this title. The Model Law is not clear about whether it would grant standing in a recognized foreign proceeding if no full case were pending. This limitation reflects concerns raised by the United States delegation during the UNCITRAL debates that a simple grant of standing to bring avoidance actions neglects to address very difficult choice of law and forum issues. This limited grant of standing in section 1523 does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation.[71] The courts will determine the nature and extent of any such action and what national law may be applicable to such action.

Sec. 1524. Intervention by a foreign representative. The wording is the same as the Model Law, except for a few clarifying words.[72] This section gives the foreign representative whose foreign proceeding has been recognized the right to intervene in United States cases, state or federal, where the debtor is a party. Recognition being an act under federal bankruptcy law, it must take effect in state as well as federal courts. This section does not require substituting the foreign representative for the debtor, although that result may be appropriate in some circumstances.

Sec. 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives. The wording of this provision is nearly identical to that of the Model Law.[73] The right of courts to communicate with other courts in worldwide insolvency cases is of central importance. This section authorizes courts to do so. This right must be exercised, however, with due regard to the rights of the parties. Guidelines for such communications are left to the federal rules of bankruptcy procedure.

Sec. 1526 Cooperation and direct communication between the trustee and foreign courts or foreign representatives. This section closely tracks the Model Law.[74] The language in Model Law article 26 concerning the trustee's function was eliminated as unnecessary because it is always implied under United States law. The section authorizes the trustee, including a debtor in possession, to cooperate with other proceedings. Subsection (3) is not taken from the Model Law but is added so that any examiner appointed under this chapter will be designated by the United States trustee and will be bonded.

Sec. 1527. Forms of cooperation. This section is identical to the Model Law.[75] United States

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[71] *See id.* at 49, ¶166.

[72] *Id.* at 49.

[73] *Id.* at 50.

[74] *Id.* at 51.

[75] Guide at 51, 53.

bankruptcy courts already engage in most of the forms of cooperation described here, but they now have explicit statutory authorization for acts like the approval of protocols of the sort used in cases.[76]

Sec. 1528. Commencement of a case under title 11 after recognition of a foreign main proceeding. This section follows the Model Law, with specifics of United States law replacing the general clause at the end of the section to cover assets normally included within the jurisdiction of the United States courts in bankruptcy cases, except where assets are subject to the jurisdiction of another recognized proceeding.[77] In a full bankruptcy case, the United States bankruptcy court generally has jurisdiction over assets outside the United States. Here that jurisdiction is limited where those assets are controlled by another recognized proceeding, if it is a main proceeding.

The court may use section 305 of this title to dismiss, stay, or limit a case as necessary to promote cooperation and coordination in a cross-border case. In addition, although the jurisdictional limitation applies only to United States bankruptcy cases commenced after recognition of a foreign proceeding, the court has ample authority under the next section and section 305 to exercise its discretion to dismiss, stay, or limit a United States case filed after a petition for recognition of a foreign main proceeding has been filed but before it has been approved, if recognition is ultimately granted.

Sec. 1529. Coordination of a case under title 11 and a foreign proceeding. This section follows the Model Law almost exactly, but subsection (4) adds a reference to section 305 to make it clear the bankruptcy court may continue to use that section, as under present law, to dismiss or suspend a United States case as part of coordination and cooperation with foreign proceedings.[78] This provision is consistent with United States policy to act ancillary to a foreign main proceeding whenever possible.

Sec. 1530. Coordination of more than one foreign proceeding. This section follows exactly article 30 of the Model Law.[79] It ensures that a foreign main proceeding will be given primacy in the United States, consistent with the overall approach of the United States favoring assistance to foreign main proceedings.

Sec. 1531. Presumption of insolvency based on recognition of a foreign main proceeding. This section follows the Model Law exactly, inserting a reference to the standard for an involuntary case under this title.[80] Where an insolvency proceeding has begun in the home country of the debtor,

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[76] *See e.g., In re* Maxwell Communication Corp., 93 F.2d 1036 (2d Cir. 1996).

[77] Guide at 54-55.

[78] *Id.* at 55-56.

[79] *Id.* at 57.

[80] *Id*. at 58.

and in the absence of contrary evidence, the foreign representative should not have to make a new showing that the debtor is in the sort of financial distress requiring a collective judicial remedy. The word "proof" in this provision here means "presumption." The presumption does not arise for any purpose outside this section.

Sec. 1532. Rule of payment in concurrent proceeding. This section follows the Model Law exactly and is very similar to prior section 508(a), which is repealed. The Model Law language is somewhat clearer and broader than the equivalent language of prior section 508(a).[81]

Sec. 802. Other Amendments to Titles 11 and 28, United States Code. Section 802(a) amends section 103 of the Bankruptcy Code to clarify the provisions of the Code that apply to chapter 15 and to specify which portions of chapter 15 apply in cases under other chapters of title 11. Section 802(b) amends the Bankruptcy Code's definitions of foreign proceeding and foreign representative in section 101. The new definitions are nearly identical to those contained in the Model Law but add to the phrase "under a law relating to insolvency" the words "or debt adjustment." This addition emphasizes that the scope of the Model Law and chapter 15 is not limited to proceedings involving only debtors which are technically insolvent, but broadly includes all proceedings involving debtors in severe financial distress, so long as those proceedings also meet the other criteria of section 101(24).[82]

Section 802(c) amends section 157(b)(2) of title 28 to provide that proceedings under chapter 15 will be core proceedings while other amendments to title 28 provide that the United States trustee's standing extends to cases under chapter 15 and that the United States trustee's duties include acting in chapter 15 cases. Although the United States will continue to assert worldwide jurisdiction over property of a domestic or foreign debtor in a full bankruptcy case under chapters 7 and 13 of this title, subject to deference to foreign proceedings under chapter 15 and section 305, the situation is different in a case commenced under chapter 15. There the United States is acting solely in an ancillary position, so jurisdiction over property is limited to that stated in chapter 15.

Section 802(d) amends section 109 of the Bankruptcy Code to permit recognition of foreign proceedings involving foreign insurance companies and involving foreign banks which do not have a branch or agency in the United States (as defined in 12 U.S.C. 3101). While a foreign bank not subject to United States regulation will be eligible for chapter 15 as a consequence of the amendment to section 109, section 303 prohibits the commencement of a full involuntary case against such a foreign bank unless the bank is a debtor in a foreign proceeding.

While section 304 is repealed and replaced by chapter 15, access to the jurisprudence which developed under section 304 is preserved in the context of new section 1507. On deciding whether to

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[81] *Id.* at 59.

[82] *Id.* at 51-52, 71.

grant the additional assistance contemplated by section 1507, the court must consider the same factors specified in former section 304. The venue provisions for cases ancillary to foreign proceedings have been amended to provide a hierarchy of choices beginning with principal place of business in the United States, if any. If there is no principal place of business in the United States, but there is litigation against a debtor, then the district in which the litigation is pending would be the appropriate venue. In any other case, venue must be determined with reference to the interests of justice and the convenience of the parties.

TITLE IX. FINANCIAL CONTRACT PROVISIONS

Sec. 901. Treatment of Certain Agreements by Conservators of Receivers of Insured Depository Institutions. Subsections (a) through (f) of section 901 of the Act amend the definitions of "qualified financial contract," "securities contract," "commodity contract," "forward contract," "repurchase agreement" and "swap agreement" contained in the Federal Deposit Insurance Act (FDIA) and the Federal Credit Union Act (FCUA) to make them consistent with the definitions in the Bankruptcy Code and to reflect the enactment of the Commodity Futures Modernization Act of 2000 (CFMA). It is intended that the legislative history and case law surrounding those terms, to the date of this amendment, be incorporated into the legislative history of the FDIA and the FCUA.

Subsection (b) amends the definition of "securities contract" expressly to encompass margin loans, to clarify the coverage of securities options and to clarify the coverage of repurchase and reverse repurchase transactions. The inclusion of "margin loans"in the definition is intended to encompass only those loans commonly known in the securities industry as "margin loans," such as arrangements where a securities broker or dealer extends credit to a customer in connection with the purchase, sale, or trading of securities, and does not include loans that are not commonly referred to as "margin loans." The reference in subsection (b) to a "guarantee by or to any securities clearing agency" is intended to cover other arrangements, such as novation, that have an effect similar to a guarantee. The reference to a "loan" of a security in the definition is intended to apply to loans of securities, whether or not for a "permitted purpose" under margin regulations. The reference to "repurchase and reverse repurchase transactions" is intended to eliminate any inquiry under the qualified financial contract provisions of the FDIA or FCUA as to whether a repurchase or reverse repurchase transaction is a purchase and sale transaction or a secured financing. Repurchase and reverse repurchase transactions meeting certain criteria are already covered under the definition of "repurchase agreement" in the FDIA (and a regulation of the Federal Deposit Insurance Corporation (FDIC)). Repurchase and reverse repurchase transactions on all securities (including, for example, equity securities, asset-backed securities, corporate bonds and commercial paper) are included under the definition of "securities contract." Subsection (b) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute "securities contracts." While a contract for the purchase, sale or repurchase of a participation may constitute a "securities contract," the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a

"securities contract."

A number of terms used in the qualified financial contract provisions, but not defined therein, are intended to have the meanings set forth in the analogous provisions of the Bankruptcy Code or Federal Deposit Insurance Corporation Improvement Act ("FDICIA"), such as, for example, "securities clearing agency". The term "person," however, is not intended to be so interpreted. Instead, "person" is intended to have the meaning set forth in section 1 of title 1 of the United States Code.

Section 901(c) amends the definition of "commodity contract" in section 11(e)(8)(D)(iii) of the FDIA and in section 207(c)(8)(D)(iii) of the FCUA. Section 901(d) amends section 11(e)(8)(D)(iv) of the FDIA and section 207(c)(8)(D)(iv) of the FCUA with respect to the definition of a "forward contract."

Subsection (e) amends the definition of "repurchase agreement" in the FDIA and the FCUA to codify the substance of the FDIC's 1995 regulation defining repurchase agreement to include those on qualified foreign government securities.[83] The term "qualified foreign government securities" is defined to include those that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD), as determined by rule, of the appropriate Federal banking agency. Subsection (e) reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. The securities are limited to those issued by or guaranteed by full members of the OECD, as well as countries that have concluded special lending arrangements with the International Monetary Fund associated with the Fund's General Arrangements to Borrow.

Subsection (e) also amends the definition of "repurchase agreement" to include those on mortgage-related securities, mortgage loans and interests therein, and expressly to include principal and interest-only U.S. government and agency securities as securities that can be the subject of a "repurchase agreement." The reference in the definition to United States government- and agency-issued or fully guaranteed securities is intended to include obligations issued or guaranteed by Fannie Mae and the Federal Home Loan Mortgage Corporation (Freddie Mac) as well as all obligations eligible for purchase by Federal Reserve banks under the similar language of section 14(b) of the Federal Reserve Act. This amendment is not intended to affect the status of repos involving securities or commodities as securities contracts, commodity contracts, or forward contracts, and their consequent eligibility for similar treatment under the qualified financial contract provisions. In particular, an agreement for the sale and repurchase of a security would continue to be a securities contract as defined in the FDIA, even if not a "repurchase agreement" as defined in the FDIA. Similarly, an agreement for the sale and repurchase of a commodity, even though not a "repurchase agreement" as

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[83] *See* 12 C.F.R. § 360.5.

defined in the FDIA, would continue to be a forward contract for purposes of the FDIA.

Subsection (e), like subsection (b) for "securities contracts," specifies that repurchase obligations under a participation in a commercial mortgage loan do not make the participation agreement a "repurchase agreement." Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a "repurchase agreement." A repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer, however, would constitute a "repurchase agreement" as well as a "securities contract".

Section 901(f) of the Act amends the definition of "swap agreement" to include an "interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option." As amended, the definition of "swap agreement" will update the statutory definition and achieve contractual netting across economically similar transactions that are the subject of recurring dealings in the swap agreements.

The definition of "swap agreement" originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. To that end, the phrase "or any other similar agreement" was included in the definition. (The phrase "or any similar agreement" has been added to the definitions of "forward contract," "commodity contract," "repurchase agreement" and "securities contract" for the same reason.) To clarify this, subsection (f) expands the definition of "swap agreement" to include "any agreement or transaction that is similar to any other agreement or transaction referred to in [section 11(e)(8)(D)(vi) of the FDIA] and is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets . . . and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value."

The definition of "swap agreement," however, should not be interpreted to permit parties to document non-swaps as swap transactions. Traditional commercial arrangements, such as supply agreements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as "swaps" under either the FDIA or the Bankruptcy Code simply because the parties purport to document or label the transactions as "swap agreements." In addition, these

definitions apply only for purposes of the FDIA and the Bankruptcy Code. These definitions, and the characterization of a certain transaction as a "swap agreement," are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f). Similarly, Section 17 and a new paragraph of Section 11(e) of the FDIA provide that the definitions of "securities contract," "repurchase agreement," "forward contract," and "commodity contract," and the characterization of certain transactions as such a contract or agreement, are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f).

The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement, including any guarantee or reimbursement obligation related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the FDIA and the Bankruptcy Code. Similar changes are made in the definitions of "forward contract," "commodity contract," "repurchase agreement" and "securities contract."

The use of the term "forward" in the definition of "swap agreement" is not intended to refer only to transactions that fall within the definition of "forward contract." Instead, a "forward" transaction could be a "swap agreement" even if not a "forward contract."

Section 901(g) amends the definition of "transfer" in the FDIA and FCUA, which is a key term used in both, to ensure that it is broadly construed to encompass dispositions of property or interests in property. The definition tracks the Bankruptcy Code's definition of this term in Bankruptcy Code section 101.

Section 901(h) makes clarifying technical changes to conform the receivership and conservatorship provisions of the FDIA and the FCUA. It also clarifies that the FDIA and the FCUA expressly protect rights under security agreements, arrangements or other credit enhancements related to one or more qualified financial contracts (QFCs). An example of a security arrangement is a right of setoff, and examples of other credit enhancements are letters of credit, guarantees, reimbursement obligations and other similar agreements.

Section 901(i) of the Act clarifies that no provision of Federal or state law relating to the avoidance of preferential or fraudulent transfers (including the anti-preference provision of the National Bank Act) can be invoked to avoid a transfer made in connection with any QFC of an insured depository institution in conservatorship or receivership, absent actual fraudulent intent on the part of the transferee.

Sec. 902. Authority of the FDIC and NCUAB with Respect to Failed and Failing Institutions.

Section 902 of the Act provides that no provision of law, including FDICIA, shall be construed to limit the power of the FDIC or the NCUAB to transfer or to repudiate any QFC in accordance with its powers under the FDIA. As discussed below, there has been some uncertainty regarding whether or not FDICIA limits the authority of the FDIC or the NCUAB to transfer or to repudiate QFCs of an insolvent financial institution. Section 902, as well as other provisions in the Act, clarify that FDICIA does not limit the transfer powers of the FDIC or the NCUAB with respect to QFCs. Section 902 denies enforcement to "walkaway" clauses in QFCs. A walkaway clause is defined as a provision that, after calculation of a value of a party's position or an amount due to or from one of the parties upon termination, liquidation or acceleration of the QFC, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party's status as a non-defaulting party.

Sec. 903. Amendments Relating to Transfers of Qualified Financial Contracts. Section 903 of the Act amends the FDIA and the FCUA to expand the transfer authority of the FDIC to permit transfers of QFCs to "financial institutions" as defined in FDICIA or in regulations. This provision will allow the FDIC to transfer QFCs to a non-depository financial institution, provided the institution is not subject to bankruptcy or insolvency proceedings.

The new FDIA and FCUA provisions specify that when the FDIC transfers QFCs that are cleared on or subject to the rules of a particular clearing organization, the transfer will not require the clearing organization to accept the transferee as a member of the organization. This provision gives the FDIC flexibility in resolving QFCs cleared on or subject to the rules of a clearing organization, while preserving the ability of such organizations to enforce appropriate risk reducing membership requirements. The amendment does not require the clearing organization to accept for clearing any QFCs from the transferee, except on the terms and conditions applicable to other parties permitted to clear through that clearing organization. "Clearing organization" is defined to mean a "clearing organization" within the meaning of FDICIA (as amended both by the CFMA and by Section 906 of the Act).

The new FDIA and FCUA provisions also permit transfers to an eligible financial institution that is a non-U.S. person, or the branch or agency of a non-U.S. person or a U.S. financial institution that is not an FDIC-insured institution if, following the transfer, the contractual rights of the parties would be enforceable substantially to the same extent as under the FDIA and the FCUA. It is expected that the FDIC would not transfer QFCs to such a financial institution if there were an impending change of law that would impair the enforceability of the parties' contractual rights.

Section 903 amends the notification requirements following a transfer of the QFCs of a failed depository institution to require the FDIC to notify any party to a transferred QFC of such transfer by 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the FDIC acting as receiver or following the date of such transfer by the FDIC acting as a conservator. This amendment is consistent with the policy statement on QFCs issued by the FDIC on December 12, 1989.

Section 903 amends the FDIA to clarify the relationship between the FDIA and FDICIA. There has been some uncertainty whether FDICIA permits counterparties to terminate or liquidate a QFC before the expiration of the time period provided by the FDIA during which the FDIC may repudiate or transfer a QFC in a conservatorship or receivership. Subsection (c) provides that a party may not terminate a QFC based solely on the appointment of the FDIC as receiver until 5:00 p.m. (Eastern Time) on the business day following the appointment of the receiver or after the person has received notice of a transfer under FDIA section 11(d)(9), or based solely on the appointment of the FDIC as conservator, notwithstanding the provisions of FDICIA. This provides the FDIC with an opportunity to undertake an orderly resolution of the insured depository institution.

Section 903 also prohibits the enforcement of rights of termination or liquidation that arise solely because of the insolvency of the institution or are based on the "financial condition" of the depository institution in receivership or conservatorship. For example, termination based on a cross-default provision in a QFC that is triggered upon a default under another contract could be rendered ineffective if such other default was caused by an acceleration of amounts due under that other contract, and such acceleration was based solely on the appointment of a conservator or receiver for that depository institution. Similarly, a provision in a QFC permitting termination of the QFC based solely on a downgraded credit rating of a party will not be enforceable in an FDIC receivership or conservatorship because the provision is based solely on the financial condition of the depository institution in default. However, any payment, delivery or other performance-based default, or breach of a representation or covenant putting in question the enforceability of the agreement, will not be deemed to be based solely on financial condition for purposes of this provision. The amendment is not intended to prevent counterparties from taking all actions permitted and recovering all damages authorized upon repudiation of any QFC by a conservator or receiver, or from taking actions based upon a receivership or other financial condition-triggered default in the absence of a transfer (as contemplated in Section 11(e)(10) of the FDIA). The amendment allows the FDIC to meet its obligation to provide notice to parties to transferred QFCs by taking steps reasonably calculated to provide notice to such parties by the required time. This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Finally, the amendment permits the FDIC to transfer QFCs of a failed depository institution to a bridge bank or a depository institution organized by the FDIC for which a conservator is appointed either (i) immediately upon the organization of such institution or (ii) at the time of a purchase and assumption transaction between the FDIC and the institution. This provision clarifies that such institutions are not to be considered financial institutions that are ineligible to receive such transfers under FDIA section 11(e)(9). This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Sec. 904. Amendments Relating to Disaffirmance or Repudiation of Qualified Financial Contracts. Section 904 of the Act limits the disaffirmance and repudiation authority of the FDIC with respect to QFCs so that such authority is consistent with the FDIC's transfer authority under FDIA section

11(e)(9) or FCUA section 207(c). This ensures that no disaffirmance, repudiation or transfer authority of the FDIC may be exercised to "cherry-pick" or otherwise treat independently all the QFCs between a depository institution in default and a person or any affiliate of such person. The FDIC has announced that its policy is not to repudiate or disaffirm QFCs selectively. This unified treatment is fundamental to the reduction of systemic risk.

Sec. 905. Clarifying Amendment Relating to Master Agreements. Section 905 of the Act specifies that a master agreement for one or more securities contracts, commodity contracts, forward contracts, repurchase agreements or swap agreements will be treated as a single QFC under the FDIA or the FCUA (but only with respect to the underlying agreements are themselves QFCs). This provision ensures that cross-product netting pursuant to a master agreement, or pursuant to an umbrella agreement for separate master agreements between the same parties, each of which is used to document one or more qualified financial contracts, will be enforceable under the FDIA and the FCUA. Cross-product netting permits a wide variety of financial transactions between two parties to be netted, thereby maximizing the present and potential future risk-reducing benefits of the netting arrangement between the parties. Express recognition of the enforceability of such cross-product master agreements furthers the policy of increasing legal certainty and reducing systemic risks in the case of an insolvency of a large financial participant.

Sec. 906. Federal Deposit Insurance Corporation Improvement Act of 1991. Subsection (a)(1) of section 906 of the Act amends the definition of "clearing organization" in section 402 of the FDICIA to include clearinghouses that are subject to exemptions pursuant to orders of the Securities and Exchange Commission or the Commodity Futures Trading Commission and to include multilateral clearing organizations (the definition of which was added to FDICIA by the CFMA).

FDICIA provides that a netting arrangement will be enforced pursuant to its terms, notwithstanding the failure of a party to the agreement. The current netting provisions of FDICIA, however, limit this protection to "financial institutions," which include depository institutions. Section 906(a)(2) amends the FDICIA definition of covered institutions to include (i) uninsured national and State member banks, irrespective of their eligibility for deposit insurance and (ii) foreign banks (including the foreign bank and its branches or agencies as a combined group, or only the foreign bank parent of a branch or agency). The latter change will extend the protections of FDICIA to ensure that U.S. financial organizations participating in netting agreements with foreign banks are covered by the Act, thereby enhancing the safety and soundness of these arrangements. It is intended that a non-defaulting foreign bank and its branches and agencies be considered to be a single financial institution for purposes of the bilateral netting provisions of FDICIA (except to the extent that the non-defaulting foreign bank and its branches and agencies on the one hand, and the defaulting financial institution, on the other, have entered into agreements that clearly evidence an intention that the non-defaulting foreign bank and its branches and agencies be treated as separate financial institutions for purposes of the bilateral netting provisions of FDICIA).

Subsection (a)(3) amends the FDICIA to provide that, for purposes of FDICIA, two or more clearing organizations that enter into a netting contract are considered "members" of each other. This assures the enforceability of netting arrangements involving two or more clearing organizations and a member common to all such organizations, thus reducing systemic risk in the event of the failure of such a member. Under the current FDICIA provisions, the enforceability of such arrangements depends on a case-by-case determination that clearing organizations could be regarded as members of each other for purposes of FDICIA.

Section 906(a)(4) of the Act amends the FDICIA definition of netting contract and the general rules applicable to netting contracts. The current FDICIA provisions require that the netting agreement must be governed by the law of the United States or a State to receive the protections of FDICIA. Many of these agreements, however, particularly netting arrangements covering positions taken in foreign exchange dealings, are governed by the laws of a foreign country. This subsection broadens the definition of "netting contract" to include those agreements governed by foreign law, and preserves the FDICIA requirement that a netting contract not be invalid under, or precluded by, Federal law.

Section 906(b) and (c) establish two exceptions to FDICIA's protection of the enforceability of the provisions of netting contracts between financial institutions and among clearing organization members. First, the termination provisions of netting contracts will not be enforceable based solely on (i) the appointment of a conservator for an insolvent depository institution under the FDIA or (ii) the appointment of a receiver for such institution under the FDIA, if such receiver transfers or repudiates QFCs in accordance with the FDIA and gives notice of a transfer by 5:00 p.m. on the business day following the appointment of a receiver. This change is made to confirm the FDIC's flexibility to transfer or repudiate the QFCs of an insolvent depository institution in accordance with the terms of the FDIA. This modification also provides important legal certainty regarding the treatment of QFCs under the FDIA, because the current relationship between the FDIA and FDICIA is unclear.

The second exception provides that FDICIA does not override a stay order under SIPA with respect to foreclosure on securities (but not cash) collateral of a debtor (section 911 of the Act makes a conforming change to SIPA). There is also an exception relating to insolvent commodity brokers. Subsections (b) and (c) also clarify that a security agreement or other credit enhancement related to a netting contract is enforceable to the same extent as the underlying netting contract.

Section 906(d) of the Act adds a new section 407 to FDICIA. This new section provides that, notwithstanding any other law, QFCs with uninsured national banks, uninsured Federal branches or agencies, or Edge Act corporations, or uninsured State member banks that operate, or operate as, a multilateral clearing organization and that are placed in receivership or conservatorship will be treated in the same manner as if the contract were with an insured national bank or insured Federal branch for which a receiver or conservator was appointed. This provision will ensure that parties to QFCs with these institutions will have the same rights and obligations as parties entering into the same agreements with insured depository institutions. The new section also specifically limits the powers of a receiver or

conservator for such an institution to those contained in 12 U.S.C. §§ 1821(e)(8), (9), (10), and (11), which address QFCs.

While the amendment would apply the same rules that apply to insured institutions, the provision would not change the rules that apply to insured institutions. Nothing in this section would amend the International Banking Act, the Federal Deposit Insurance Act, the National Bank Act, or other statutory provisions with respect to receiverships of insured national banks or Federal branches.

Sec. 907. Bankruptcy Law Amendments. Section 907 of the Act makes a series of amendments to the Bankruptcy Code. Subsection (a)(1) amends the Bankruptcy Code definitions of "repurchase agreement" and "swap agreement" to conform with the amendments to the FDIA contained in sections 901(e) and (f) of the Act.

In connection with the definition of "repurchase agreement," the term "qualified foreign government securities" is defined to include securities that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). This language reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. The securities are limited to those issued by or guaranteed by full members of the OECD, as well as countries that have concluded special lending arrangements with the International Monetary Fund associated with the Fund's General Arrangements to Borrow.

Subsection (a)(1) also amends the definition of "repurchase agreement" to include those on mortgage-related securities, mortgage loans and interests therein, and to include principal and interest-only U.S. government and agency securities as securities that can be the subject of a "repurchase agreement." The reference in the definition to United States government- and agency-issued or fully guaranteed securities is intended to include obligations issued or guaranteed by Fannie Mae and the Federal Home Loan Mortgage Corporation (Freddie Mac) as well as all obligations eligible for purchase by Federal Reserve banks under the similar language of section 14(b) of the Federal Reserve Act.

This amendment is not intended to affect the status of repos involving securities or commodities as securities contracts, commodity contracts, or forward contracts, and their consequent eligibility for similar treatment under other provisions of the Bankruptcy Code. In particular, an agreement for the sale and repurchase of a security would continue to be a securities contract as defined in the Bankruptcy Code and thus also would be subject to the Bankruptcy Code provisions pertaining to securities contracts, even if not a "repurchase agreement" as defined in the Bankruptcy Code. Similarly, an agreement for the sale and repurchase of a commodity, even though not a "repurchase agreement" as defined in the Bankruptcy Code, would continue to be a forward contract for purposes of the Bankruptcy Code and would be subject to the Bankruptcy Code provisions pertaining to forward contracts.

Subsection (a)(1) specifies that repurchase obligations under a participation in a commercial mortgage loan do not make the participation agreement a "repurchase agreement." These repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a "repurchase agreement." However, a repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer would constitute a "repurchase agreement" (as well as a "securities contract").

The definition of "swap agreement" is amended to include an "interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option." As amended, the definition of "swap agreement" will update the statutory definition and achieve contractual netting across economically similar transactions.

The definition of "swap agreement" originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. To that end, the phrase "or any other similar agreement" was included in the definition. (The phrase "or any similar agreement" has been added to the definitions of "forward contract," "commodity contract," "repurchase agreement," and "securities contract" for the same reason.) To clarify this, subsection (a)(1) expands the definition of "swap agreement" to include "any agreement or transaction that is similar to any other agreement or transaction referred to in [Section 101(53B) of the Bankruptcy Code] and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets… and [that] is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value."

The definition of "swap agreement" in this subsection should not be interpreted to permit parties to document non-swaps as swap transactions. Traditional commercial arrangements, such as supply agreements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as "swaps" under either the FDIA or the Bankruptcy Code because the parties purport to document or label the transactions as "swap agreements." These definitions, and the characterization of a certain transaction as a "swap agreement," are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (a)(1)(C).

Similarly, the definitions of "securities contract," "repurchase agreement," and "commodity contract" and the characterization of certain transactions as such a contract or agreement, are not intended to affect the characterization, definition, or treatment of any instrument under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f).

The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement, including any guarantee or reimbursement obligation related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the Bankruptcy Code and the FDIA. Similar changes are made in the definitions of "forward contract," "commodity contract," "repurchase agreement," and "securities contract." An example of a security arrangement is a right of setoff; examples of other credit enhancements are letters of credit and other similar agreements. A security agreement or arrangement or guarantee or reimbursement obligation related to a "swap agreement," "forward contract," "commodity contract," "repurchase agreement" or "securities contract" will be such an agreement or contract only to the extent of the damages in connection with such agreement measured in accordance with Section 562 of the Bankruptcy Code (added by the Act). This limitation does not affect, however, the other provisions of the Bankruptcy Code (including Section 362(b)) relating to security arrangements in connection with agreements or contracts that otherwise qualify as "swap agreements," "forward contracts," "commodity contracts," "repurchase agreements" or "securities contracts."

The use of the term "forward" in the definition of "swap agreement" is not intended to refer only to transactions that fall within the definition of "forward contract." Instead, a "forward" transaction could be a "swap agreement" even if not a "forward contract."

Subsections (a)(2) and (a)(3) amend the Bankruptcy Code definitions of "securities contract" and "commodity contract," respectively, to conform them to the definitions in the FDIA.

Subsection (a)(2), like the amendments to the FDIA, amends the definition of "securities contract" expressly to encompass margin loans, to clarify the coverage of securities options and to clarify the coverage of repurchase and reverse repurchase transactions. The inclusion of "margin loans" in the definition is intended to encompass only those loans commonly known in the securities industry as "margin loans," such as arrangements where a securities broker or dealer extends credit to a customer in connection with the purchase, sale, or trading of securities, and does not include loans that are not commonly referred to as "margin loans." The reference in subsection (b) to a "guarantee" by or to a "securities clearing agency" is intended to cover other arrangements, such as novation, that have an effect similar to a guarantee. The reference to a "loan" of a security in the definition is intended to apply to loans of securities, whether or not for a "permitted purpose" under margin regulations. The reference to "repurchase and reverse repurchase transactions" is intended to eliminate any inquiry under section 555 and related provisions as to whether a repurchase or reverse repurchase transaction is a purchase

and sale transaction or a secured financing. Repurchase and reverse repurchase transactions meeting certain criteria are already covered under the definition of "repurchase agreement" in the Bankruptcy Code. Repurchase and reverse repurchase transactions on all securities (including, for example, equity securities, asset-backed securities, corporate bonds and commercial paper) are included under the definition of "securities contract". A repurchase or reverse repurchase transaction which is a "securities contract" but not a "repurchase agreement" would thus be subject to the "counterparty limitations" contained in section 555 of the Bankruptcy Code (i.e., only stockbrokers, financial institutions, securities clearing agencies and financial participants can avail themselves of section 555 and related provisions).

Subsection (a)(2) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute "securities contracts." While a contract for the purchase, sale or repurchase of a participation may constitute a "securities contract," the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a "securities contract." Section 907(a) clarifies the reference to guarantee or reimbursement obligation.

Section 907(b) amends the Bankruptcy Code definitions of "financial institution" and "forward contract merchant." The definition for "financial institution" includes Federal Reserve Banks and the receivers or conservators of insolvent depository institutions. With respect to securities contracts, the definition of "financial institution" expressly includes investment companies registered under the Investment Company Act of 1940.

Subsection (b) also adds a new definition of "financial participant" to limit the potential impact of insolvencies upon other major market participants. This definition will allow such market participants to close-out and net agreements with insolvent entities under sections 362(b)(6), 555, and 556 even if the creditor could not qualify as, for example, a commodity broker. Sections 362(b)(6), 555 and 556 preserve the limitations of the right to close-out and net such contracts, in most cases, to entities who qualify under the Bankruptcy Code's counterparty limitations. However, where the counterparty has transactions with a total gross dollar value of at least $1 billion in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least $100 million (aggregated across counterparties) in one or more agreements or transactions on any day during the previous 15-month period, sections 362(b)(6), 555 and 556 and corresponding amendments would permit it to exercise netting and related rights irrespective of its inability otherwise to satisfy those counterparty limitations. This change will help prevent systemic impact upon the markets from a single failure, and is derived from threshold tests contained in Regulation EE promulgated by the Federal Reserve Board in implementing the netting provisions of the Federal Deposit Insurance Corporation Improvement Act. It is intended that the 15-month period be measured with reference to the 15 months preceding the filing of a petition by or against the debtor.

"Financial participant" is also defined to include "clearing organizations" within the meaning of

FDICIA (as amended by the CFMA and Section 906 of the Act). This amendment, together with the inclusion of "financial participants" as eligible counterparties in connection with "commodity contracts," "forward contracts" and "securities contracts" and the amendments made in other Sections of the Act to include "financial participants" as counterparties eligible for the protections in respect of "swap agreements" and "repurchase agreements", take into account the CFMA and will allow clearing organizations to benefit from the protections of all of the provisions of the Bankruptcy Code relating to these contracts and agreements. This will further the goal of promoting the clearing of derivatives and other transactions as a way to reduce systemic risk. The definition of "financial participant" (as with the other provisions of the Bankruptcy Code relating to "securities contracts," "forward contracts," "commodity contracts," "repurchase agreements" and "swap agreements") is not mutually exclusive, i.e., an entity that qualifies as a "financial participant" could also be a "swap participant," "repo participant," "forward contract merchant," "commodity broker," "stockbroker," "securities clearing agency" and/or "financial institution."

Section 907(c) of the Act adds to the Bankruptcy Code new definitions for the terms "master netting agreement" and "master netting agreement participant." The definition of "master netting agreement" is designed to protect the termination and close-out netting provisions of cross-product master agreements between parties. Such an agreement may be used (i) to document a wide variety of securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements or (ii) as an umbrella agreement for separate master agreements between the same parties, each of which is used to document a discrete type of transaction. The definition includes security agreements or arrangements or other credit enhancements related to one or more such agreements and clarifies that a master netting agreement will be treated as such even if it documents transactions that are not within the enumerated categories of qualifying transactions (but the provisions of the Bankruptcy Code relating to master netting agreements and the other categories of transactions will not apply to such other transactions). A "master netting agreement participant" is any entity that is a party to an outstanding master netting agreement with a debtor before the filing of a bankruptcy petition.

Subsection (d) amends section 362(b) of the Bankruptcy Code to protect enforcement, free from the automatic stay, of setoff or netting provisions in swap agreements and in master netting agreements and security agreements or arrangements related to one or more swap agreements or master netting agreements. This provision parallels the other provisions of the Bankruptcy Code that protect netting provisions of securities contracts, commodity contracts, forward contracts, and repurchase agreements. Because the relevant definitions include related security agreements, the references to "setoff" in these provisions, as well as in section 362(b)(6) and (7) of the Bankruptcy Code, are intended to refer also to rights to foreclose on, and to set off against obligations to return, collateral securing swap agreements, master netting agreements, repurchase agreements, securities contracts, commodity contracts, or forward contracts. Collateral may be pledged to cover the cost of replacing the defaulted transactions in the relevant market, as well as other costs and expenses incurred or estimated to be incurred for the purpose of hedging or reducing the risks arising out of such termination. Enforcement of these agreements and arrangements free from the automatic stay is consistent with the policy goal of minimizing systemic risk.

Subsection (d) also clarifies that the provisions protecting setoff and foreclosure in relation to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements free from the automatic stay apply to collateral pledged by the debtor but that cannot technically be "held by" the creditor, such as receivables and book-entry securities, and to collateral that has been repledged by the creditor and securities re-sold pursuant to repurchase agreements.

Subsections (e) and (f) of section 907 of the Act amend sections 546 and 548(d) of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud and not taken in good faith. This amendment provides the same protections for a transfer made under, or in connection with, a master netting agreement as currently is provided for margin payments, settlement payments and other transfers received by commodity brokers, forward contract merchants, stockbrokers, financial institutions, securities clearing agencies, repo participants, and swap participants under sections 546 and 548(d), except to the extent the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

Subsections (g), (h), (i), and (j) of section 907 clarify that the provisions of the Bankruptcy Code that protect (i) rights of liquidation under securities contracts, commodity contracts, forward contracts and repurchase agreements also protect rights of termination or acceleration under such contracts, and (ii) rights to terminate under swap agreements also protect rights of liquidation and acceleration.

Section 907(k) of the Act adds a new section 561 to the Bankruptcy Code to protect the contractual right of a master netting agreement participant to enforce any rights of termination, liquidation, acceleration, offset or netting under a master netting agreement. These rights include rights arising (i) from the rules of a derivatives clearing organization, multilateral clearing organization, securities clearing agency, securities exchange, securities association, contract market, derivatives transaction execution facility or board of trade, (ii) under common law, law merchant or (iii) by reason of normal business practice. This reflects the enactment of the CFMA and the current treatment of rights under swap agreements under section 560 of the Bankruptcy Code. Similar changes to reflect the enactment of the CFMA have been made to the definition of "contractual right" for purposes of Sections 555, 556, 559 and 560 of the Bankruptcy Code.

Subsections (b)(2)(A) and (b)(2)(B) of new Section 561 limit the exercise of contractual rights to net or to offset obligations where the debtor is a commodity broker and one leg of the obligations sought to be netted relates to commodity contracts traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act. Under subsection (b)(2)(A) netting or offsetting is not permitted in these circumstances if the party seeking to net or to offset has no positive net equity in the commodity accounts at the debtor. Subsection (b)(2)(B) applies only if the debtor is a commodity

broker, acting on behalf of its own customer, and is in turn a customer of another commodity broker. In that case, the latter commodity broker may not net or offset obligations under such commodity contracts with other claims against its customer, the debtor. Subsections (b)(2)(A) and (b)(2)(B) limit the depletion of assets available for distribution to customers of commodity brokers. Subsection (b)(2)(C) provides an exception to subsections (b)(2)(A) and (b)(2)(B) for cross-margining and other similar arrangements approved by, or submitted to and not rendered ineffective by, the Commodity Futures Trading Commission, as well as certain other netting arrangements.

For the purposes of Bankruptcy Code sections 555, 556, 559, 560 and 561, it is intended that the normal business practice in the event of a default of a party based on bankruptcy or insolvency is to terminate, liquidate or accelerate securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements with the bankrupt or insolvent party. The protection of netting and offset rights in sections 560 and 561 is in addition to the protections afforded in sections 362(b)(6), (b)(7), (b)(17) and (b)(28) of the Bankruptcy Code.

Under the Act, the termination, liquidation or acceleration rights of a master netting agreement participant are subject to limitations contained in other provisions of the Bankruptcy Code relating to securities contracts and repurchase agreements. In particular, if a securities contract or repurchase agreement is documented under a master netting agreement, a party's termination, liquidation and acceleration rights would be subject to the provisions of the Bankruptcy Code relating to orders authorized under the provisions of SIPA or any statute administered by the SEC. In addition, the netting rights of a party to a master netting agreement would be subject to any contractual terms between the parties limiting or waiving netting or set off rights. Similarly, a waiver by a bank or a counterparty of netting or set off rights in connection with QFCs would be enforceable under the FDIA.

New Section 561 of the Bankruptcy Code clarifies that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements apply in a proceeding ancillary to a foreign insolvency proceeding under new section 304 of the Bankruptcy Code.

Subsections (l) and (m) of section 907 of the Act clarify that the exercise of termination and netting rights will not otherwise affect the priority of the creditor's claim after the exercise of netting, foreclosure and related rights.

Subsection (n) amends section 553 of the Bankruptcy Code to clarify that the acquisition by a creditor of setoff rights in connection with swap agreements, repurchase agreements, securities contracts, forward contracts, commodity contracts and master netting agreements cannot be avoided as a preference. This subsection also adds setoff of the kinds described in sections 555, 556, 559, 560, and 561 of the Bankruptcy Code to the types of setoff excepted from section 553(b).

Section 907(o), as well as other subsections of the Act, adds references to "financial

participant" in all the provisions of the Bankruptcy Code relating to securities, forward and commodity contracts and repurchase and swap agreements.

Sec. 908. Recordkeeping Requirements. Section 908 of the Act amends section 11(e)(8) of the Federal Deposit Insurance Act to explicitly authorize the FDIC, in consultation with appropriate Federal banking agencies, to prescribe regulations on recordkeeping by any insured depository institution with respect to QFCs only if the insured financial institution is in a troubled condition (as such term is defined in the FDIA).

Sec. 909. Exemptions from Contemporaneous Execution Requirement. Section 909 of the Act amends FDIA section 13(e)(2) to provide that an agreement for the collateralization of governmental deposits, bankruptcy estate funds, Federal Reserve Bank or Federal Home Loan Bank extensions of credit or one or more QFCs shall not be deemed invalid solely because such agreement was not entered into contemporaneously with the acquisition of the collateral or because of pledges, delivery or substitution of the collateral made in accordance with such agreement.

The amendment codifies portions of policy statements issued by the FDIC regarding the application of section 13(e), which codifies the "D'Oench Duhme" doctrine. With respect to QFCs, this codification recognizes that QFCs often are subject to collateral and other security arrangements that may require posting and return of collateral on an ongoing basis based on the mark-to-market values of the collateralized transactions. The codification of only portions of the existing FDIC policy statements on these and related issues should not give rise to any negative implication regarding the continued validity of these policy statements.

Sec. 910. Damage Measure. Section 910 of the Act adds a new section 562 to the Bankruptcy Code providing that damages under any swap agreement, securities contract, forward contract, commodity contract, repurchase agreement or master netting agreement will be calculated as of the earlier of (i) the date of rejection of such agreement by a trustee or (ii) the date or dates of liquidation, termination or acceleration of such contract or agreement.

Section 562 provides an exception to the rules in (i) and (ii) if there are no commercially reasonable determinants of value as of such date or dates, in which case damages are to be measured as of the earliest subsequent date or dates on which there are commercially reasonable determinants of value. Although it is expected that in most circumstances damages would be measured as of the date or dates of either rejection or liquidation, termination or acceleration, in certain unusual circumstances, such as dysfunctional markets or liquidation of very large portfolios, there may be no commercially reasonable determinants of value for liquidating any such agreements or contracts or for liquidating all such agreements and contracts in a large portfolio on a single day. It is expected that measuring damages as of a date or dates before the date of liquidation, termination, or acceleration will occur only in very unusual circumstances.

The party determining damages is given limited discretion to determine the dates as of which damages are to be measured. Its actions are circumscribed unless there are no "commercially reasonable" determinants of value for it to measure damages on the date or dates of either rejection or liquidation, termination or acceleration. The references to "commercially reasonable" are intended to reflect existing state law standards relating to a creditor's actions in determining damages. New section 562 provides that if damages are not measured as of either the date of rejection or the date or dates of liquidation, termination or acceleration and the trustee challenges the timing of the measurement of damages by the non-defaulting party determining the damages, then the non-defaulting party, rather than the trustee, has the burden of proving the absence of any commercially reasonable determinants of value.

New section 562 is not intended to have any impact on the determination under the Bankruptcy Code of the timing of damages for contracts and agreements other than those specified in section 562. Also, section 562 does not apply to proceedings under the FDIA, and it is not intended that Section 562 have any impact on the interpretation of the provisions of the FDIA relating to timing of damages in respect of QFCs or other contracts.

Sec. 911. SIPC Stay. Section 911 of the Act amends SIPA to provide that an order or decree issued pursuant to SIPA shall not operate as a stay of any right of liquidation, termination, acceleration, offset or netting under one or more securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements (as defined in the Bankruptcy Code and including rights of foreclosure on collateral), except that such order or decree may stay any right to foreclose on or dispose of securities (but not cash) collateral pledged by the debtor or sold by the debtor under a repurchase agreement or lent by the debtor under a securities lending agreement. A corresponding amendment to FDICIA is made by section 906. A creditor that was stayed in exercising rights against such securities would be entitled to post-insolvency interest to the extent of the value of such securities.

TITLE X. PROTECTION OF FAMILY FARMERS

Sec. 1001. Permanent Reenactment of Chapter 12. Chapter 12 is a specialized form of bankruptcy relief available only to a "family farmer with regular annual income,"[84] a defined term.[85] This form of bankruptcy relief permits eligible family farmers, under the supervision of a bankruptcy trustee,[86] to

[84] 11 U.S.C. § 109(f).

[85] 11 U.S.C. § 101(19).

[86] 11 U.S.C. § 1202.

reorganize their debts pursuant to a repayment plan.[87] The special attributes of chapter 12 make it better suited to meet the particularized needs of family farmers in financial distress than other forms of bankruptcy relief, such as chapter 11[88] and chapter 13.[89]

Chapter 12 was enacted on a temporary seven-year basis as part of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986[90] in response to the farm financial crisis of the early- to mid-1980's.[91] It was subsequently reenacted and extended on several occasions. The most recent extension, authorized as part of the Farm Security and Rural Investment Act of 2002, provides that chapter remains in effect until December 31, 2002.[92]

Section 1001(a) of the Act reenacts chapter 12 of the Bankruptcy Code and provides that such reenactment takes effect as of July 1, 2005. Section 1001(b) makes a conforming amendment to section 302 of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. As a result of this provision, chapter 12 becomes a permanent form of relief under the Bankruptcy Code.

Sec. 1002. Debt Limit Increase. Section 1002 of the Act amends section 104(b) of the Bankruptcy

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[87] 11 U.S.C. § 1222.

[88] For example, chapter 12 is typically less complex and expensive than chapter 11, a form of bankruptcy relief generally utilized to effectuate large corporate reorganizations.

[89] Chapter 13, a form of bankruptcy relief for individuals seeking to reorganize their debts, limits its eligibility to debtors with debts in lower amounts than permitted for eligibility purposes under chapter 12. *Cf.* 11 U.S.C. §§ 109(e), 101(18).

[90] Pub. L. No. 99-554, § 255, 100 Stat. 3088, 3105 (1986).

[91] *See* U.S. DEPT. OF AGRICULTURE, INFO. BULL. NO. 724-09, ISSUES IN AGRICULTURAL AND RURAL FINANCE: DO FARMERS NEED A SEPARATE CHAPTER IN THE BANKRUPTCY CODE? (Oct. 1997). As one of the principal proponents of this legislation explained:

> I doubt there will be anything that we do that will have such an immediate impact in the grassroots of our country with respect to the situation that exists in most of the heartland, and that is in the agricultural sector . . . .
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> * * *
>
> You know, William Jennings Bryan in his famous speech, the Cross of Gold, almost 60 years ago [sic], stated these words: "Destroy our cities and they will spring up again as if by magic; but destroy our farms, and the grass will grow in every city in our country."
>
> This legislation will hopefully stem the tide that we have seen so recently in the massive bankruptcies in the family farm area.

132 CONG. REC. 28,147 (1986) (statement of Rep. Mike Synar (D-Okla.)).

[92] Pub. L. No. 107-171, §10814 (2002).

Code to provide for periodic adjustments for inflation of the debt eligibility limit for family farmers.

Sec. 1003. Certain Claims Owed to Governmental Units. Subsection (a) of section 1003 of the Act amends section 1222(a) of the Bankruptcy Code to add an exception with respect to payments to a governmental unit for a debt entitled to priority under section 507 if such debt arises from the sale, transfer, exchange, or other disposition of an asset used in the debtor's farming operation, but only if the debtor receives a discharge. Section 1003(b) amends section 1231(b) of the Bankruptcy Code to have it apply to any governmental unit. Subsection (c) provides that section 1003 becomes effective on the date of enactment of this Act and applies to cases commenced after such effective date.

Sec. 1004. Definition of Family Farmer. Section 1004 of the Act amends the definition of "family farmer" in section 101(18) of the Bankruptcy Code to increase the debt eligibility limit from $1,500,000 to $3,237,000. It also reduces the percentage of the farmer's liabilities that must arise out of the debtor's farming operation for eligibility purposes from 80 percent to 50 percent.

Sec. 1005. Elimination of Requirement that Family Farmer and Spouse Receive over 50 Percent of Income from Farming Operation in Year Prior to Bankruptcy. Section 1005 of the Act amends the Bankruptcy Code's definition of "family farmer" with respect to the determination of the farmer's income. Current law provides that a debtor, in order to be eligible to be a family farmer, must derive a specified percentage of his or her income from farming activities for the taxable year preceding the commencement of the bankruptcy case. Section 1005 adjusts the threshold percentage to be met during either: (1) the taxable year preceding the filing of the bankruptcy case; or (2) the taxable year in the second and third taxable years preceding the filing of the bankruptcy case.

Sec. 1006. Prohibition of Retroactive Assessment of Disposable Income. Section 1006 of the Act amends the Bankruptcy Code in two respects concerning chapter 12 plans. Section 1006(a) amends Bankruptcy Code section 1225(b) to permit the court to confirm a plan even if the distribution proposed under the plan equal or exceed the debtor's projected disposable income for that period, providing the plan otherwise satisfies the requirements for confirmation. Section 1006(b) amends Bankruptcy Code section 1229 to restrict the bases for modifying a confirmed chapter 12 plan. Specifically, Section 1006(b) to provide that a confirmed chapter 12 plan may not be modified to increase the amount of payments due prior to the date of the order modifying the confirmation of the plan. Where the modification is based on an increase in the debtor's disposable income, the plan may not be modified to require payments to unsecured creditors in any particular month in an amount greater than the debtor's disposable income for that month, unless the debtor proposes such a modification. Section 1006(b) further provides that a modification of a plan shall not require payments that would leave the debtor with insufficient funds to carry on the farming operation after the plan is completed, unless the debtor proposes such a modification.

Sec. 1007. Family Fishermen. Subsection (a) of section 1007 of the Act amends Bankruptcy Code section 101 to add definitions of "commercial fishing operation," "commercial fishing vessel," "family

fisherman" and "family fisherman with regular annual income." The definition of "commercial fishing operation" includes the catching or harvesting of fish, shrimp, lobsters, urchins, seaweed, shellfish, or other aquatic species or products. The term "commercial fishing vessel" is defined as a vessel used by a fisher to "carry out a commercial fishing operation." The term "family fisherman" is defined as an individual engaged in a commercial fishing operation, with an aggregate debt limit of $1.5 million. The definition specifies that at least 80 percent of those debts must be derived from a commercial fishing operation. The percentage of income that must be derived from such operation is specified to be more than 50 percent of the individual's gross income for the taxable year preceding the taxable year in which the case was filed. Similar provisions are included for corporations and partnerships. The term "family fisherman with regular annual income" is defined as a family fisherman whose annual income is sufficiently stable and regular to enable such person to make payments under a chapter 12 plan. Section 1007(b) amends Bankruptcy Code section 109 to provide that a family fisherman is eligible to be a debtor under chapter 12. Section 1007(c) amends the heading of chapter 12 to include a reference to family fisherman and makes conforming revisions to Sections 1203 and 1206.

TITLE XI. HEALTH CARE AND EMPLOYEE BENEFITS

Sec. 1101. Definitions. Subsection (a) of section 1101 of the Act amends section 101 of the Bankruptcy Code to add a definition of "health care business." The definition includes any public or private entity (without regard to whether that entity is for or not for profit) that is primarily engaged in offering to the general public facilities and services for diagnosis or treatment of injury, deformity or disease; and surgical, drug treatment, psychiatric or obstetric care. It also includes the following entities: (1) a general or specialized hospital; (2) an ancillary ambulatory, emergency, or surgical treatment facility; (3) a hospice; (d) a home health agency; (e) other health care institution that is similar to an entity referred to in (a) through (d); and other long-term care facility. These include a skilled nursing facility, intermediate care facility; assisted living facility, home for the aged, domiciliary care facility, and health care institution that is related to an aforementioned facility. Section 1101(b) amends Bankruptcy Code section 101 to add a definition of "patient." The term means an individual who obtains or receives services from a health care business. Section 1101(c) amends section 101 of the Bankruptcy Code to add a definition of "patient records." The term means any written document relating to a patient or record recorded in a magnetic, optical, or other form of electronic medium. Section 1101(d) specifies that the amendments effected by new section 101(27A) do not affect the interpretation of section 109(b).

Sec. 1102. Disposal of Patient Records. Section 1102 of the Act adds a provision to the Bankruptcy Code specifying requirements for the disposal of patient records in a chapter 7, 9, or 11 case of a health care business where the trustee lacks sufficient funds to pay for the storage of such records in accordance with applicable federal or state law. The requirements chiefly consist of providing notice to the affected patients and specifying the method of disposal for unclaimed records. They are intended to protect the privacy and confidentiality of a patient's medical records when they are in the custody of a

health care business in bankruptcy. The provision specifies the following requirements:

(1) The trustee shall: (a) publish notice in one or more appropriate newspapers stating that if the records are not claimed by the patient or an insurance provider (if permitted under applicable law) within 90 days of the date of such notice, then the trustee will destroy such records; and (b) during such 90-day period, attempt to directly notify by mail each patient and appropriate insurance carrier of the claiming or disposing of such records.
(2) If after providing such notice patient records are not claimed within the specified period, the trustee shall, upon the expiration of such period, send a request by certified mail to each appropriate federal agency to request permission from such agency to deposit the records with the agency.
(3) If after providing the notice as set forth above, patient records are not claimed, the trustee shall destroy such records as follows: (a) by shredding or burning, if the records are written; or (b) by destroying the records so that their information cannot be retrieved, if the records are magnetic, optical or electronic.

It is anticipated that if the estate of the debtor lacks the funds to pay for the costs and expenses related to the above, the trustee may recover such costs and expenses under section 506(c) of the Bankruptcy Code.

Sec. 1103. Administrative Expense Claim for Costs of Closing a Health Care Business and Other Administrative Expenses. Section 1103 of the Act amends section 503(b) of the Bankruptcy Code to provide that the actual, necessary costs and expenses of closing a health care business (including the disposal of patient records or transferral of patients) incurred by a trustee, federal agency, or a department or agency of a state are allowed administrative expenses.

Sec. 1104. Appointment of Ombudsman to Act as Patient Advocate. Section 1104 of the Act adds a provision to the Bankruptcy Code requiring the court to order the appointment of an ombudsman to monitor the quality of patient care within 30 days after commencement of a chapter 7, 9, or 11 health care business bankruptcy case, unless the court finds that such appointment is not necessary for the protection of patients under the specific facts of the case. The ombudsman must be a disinterested person. If the health care business is a long-term care facility, a person who is serving as a State Long-Term Care Ombudsman of the Older Americans Act of 1965 may be appointed as the ombudsman in such case. The ombudsman must: (1) monitor the quality of patient care to the extent necessary under the circumstances, including interviewing patients and physicians; (2) report to the court, not less than 60 days from the date of appointment and then every 60 days thereafter, at a hearing or in writing regarding the quality of patient care at the health care business involved; and (3) notify the court by motion or written report (with notice to appropriate parties in interest) if the ombudsman determines that the quality of patient care is declining significantly or is otherwise being materially compromised. The provision requires the ombudsman to maintain any information obtained that relates to patients (including patient records) as confidential. Section 1104(b) amends section 330(a)(1) of the

Bankruptcy Code to authorize the payment of reasonable compensation to an ombudsman.

Sec. 1105. Debtor in Possession; Duty of Trustee to Transfer Patients. Section 1105 of the Act amends section 704(a) of the Bankruptcy Code to require a trustee or debtor in possession to use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business. The transferee health care business should be in the vicinity of the transferor health care business, provide the patient with services that are substantially similar to those provided by the transferor health care business, and maintain a reasonable quality of care.

Sec. 1106. Exclusion from Program Participation Not Subject to Automatic Stay. Section 1106 amends section 362(b) of the Bankruptcy Code to except from the automatic stay the exclusion by the Secretary of Health and Human Services of a debtor from participation in the medicare program or other specified federal health care programs.

TITLE XII. TECHNICAL AMENDMENTS

Sec. 1201. Definitions. Section 1201 of the Act amends the definitions contained in section 101 of the Bankruptcy Code. Paragraphs (1), (2), (4), and (7) of section 1201 make technical changes to section 101 to convert each definition into a sentence (thereby facilitating future amendments to the separate paragraphs) and to redesignate the definitions in correct and completely numerical sequence. Paragraph (3) of section 1101 makes necessary and conforming amendments to cross references to the newly redesignated definitions.

Paragraph (5) of section 1201 concerns single asset real estate debtors. A single asset real estate chapter 11 case presents special concerns. As the name implies, the principal asset in this type of case consists of some form of real estate, such as undeveloped land. Typically, the form of ownership of a single asset real estate debtor is a corporation or limited partnership. The largest creditor in a single asset real estate case is typically the secured lender who advanced the funds to the debtor to acquire the real property. Often, a single asset real estate debtor resorts to filing for bankruptcy relief for the sole purpose of staying an impending foreclosure proceeding or sale commenced by the secured lender. Foreclosure actions are filed when the debtor lacks sufficient cash flow to service the debt and maintain the property. Taxing authorities may also have liens against the property. Based on the nature of its principal asset, a single asset real estate debtor often has few, if any, unsecured creditors. If unsecured creditors exist, they may have only nominal claims against the single asset real estate debtor. Depending on the nature and ownership of any business operating on the debtor's real property, the debtor may have few, if any, employees. Accordingly, there may be little interest on behalf of unsecured creditors in a single asset real estate case to serve on a creditors' committee.

In 1994, the Bankruptcy Code was amended to accord special treatment for single asset real estate debtors. It defined this type of debtor as a bankruptcy estate comprised of a single piece of real property or project, other than residential real property with fewer than four residential units. The property or project must generate substantially all of the debtor's gross income. A debtor that conducts substantial business on the property beyond that relating to its operation is excluded from this definition. In addition, the definition fixed a monetary cap. To qualify as a single asset real estate debtor, the debtor could not have noncontingent, liquidated secured debts in excess of $4 million. Subparagraph (5)(A) amends the definition of ``single asset real estate" to exclude family farmers from this definition. Paragraph (5)(B) amends section 101(51B) of the Bankruptcy Code to eliminate the $4 million debt limitation on single asset real estate. The present $4 million cap prevents the use of the expedited relief procedure in many commercial property reorganizations, and effectively provides an opportunity for a number of debtors to abusively file for bankruptcy in order to obtain the protection of the automatic stay against their creditors. As a result of this amendment, creditors in more cases will be able to obtain the expedited relief from the automatic stay which is made available under section 362(d)(3) of the Bankruptcy Code.

Paragraph (6) of section 1201, together with section 1214, respond to a 1997 Ninth Circuit case, in which two purchase money lenders (without knowledge that the debtor had recently filed an undisclosed chapter 11 case that was subsequently converted to chapter 7), funded the debtor's acquisition of an apartment complex and recorded their purchase-money deed of trust immediately following recordation of the deed to the debtors.[93] Specifically, it amends the definition of "transfer" in section 101(54) of the Bankruptcy Code to include the "creation of a lien." This amendment gives expression to a widely held understanding since the enactment of the Bankruptcy Reform Act of 1978,[94] that is, a transfer includes the creation of a lien.

Sec. 1202. Adjustment of Dollar Amounts. Bankruptcy Code section 104 provides for the periodic automatic adjustment of certain dollar amounts specified in the Code to reflect the change in the Consumer Price Index. Section 1202 amends Bankruptcy Code section 104(b) to add a reference to certain other monetary amounts specified in the Bankruptcy Code section. These include: (1) section 522(f)(3) (pertaining to the avoidance of certain liens on implements and other personal property valued at less than $5,000); (2) section 101(19A) (definition of family fisherman); (3) section 522(f)(4) (definition of household goods); (4) section 541(b) (property items, such as certain educational individual retirement accounts and tuition credit or certificate programs, that do not constitute property of the bankruptcy estate); (5) section 547(c)(9) (limits the avoidance of a preferential transfer, under certain circumstances); (6) section 1322(d) (concerning the applicability of the needs-based test to chapter 13 debtors with above median incomes); (7) section 1325(b) (determination of disposable income for chapter 13 debtors with above median incomes); and (8) section1326(b)(3) (payments to a

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[93]Thompson v. Margen (*In re* McConville), 110 F.3d 47 (9th Cir.), *cert. denied*, 522 U.S. 966 (1997).

[94]Pub. L. No. 95-598, 92 Stat. 2549 (1978).

chapter 7 trustee in a chapter 13 case). In addition, the provision adds a reference to section1409(b) of title 28 of the United States Code, which pertains to the venue of proceedings to recover a money judgment or property.

Sec. 1203. Extension of Time. Section 1203 of the Act makes a technical amendment to correct a reference error described in amendment notes contained in the United States Code. As specified in the amendment note relating to subsection (c)(2) of section 108 of the Bankruptcy Code, the amendment made by section 257(b)(2)(B) of Public Law 99-554 could not be executed as stated.

Sec. 1204. Technical Amendments. Section 1204 of the Act makes technical amendments to Bankruptcy Code sections 109(b)(2) (to strike an statutory cross reference), 541(b)(2) (to add “or” to the end of this provision), and 522(b)(1) (to replace “product” with “products”).

Sec. 1205. Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions. Section 1205 of the Act amends section 110(j)(4) of the Bankruptcy Code to change the reference to attorneys from the singular possessive to the plural possessive.

Sec. 1206. Limitation on Compensation of Professional Persons. Section 328(a) of the Bankruptcy Code provides that a trustee or a creditors' and equity security holders' committee may, with court approval, obtain the services of a professional person on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Section 1206 of the Act amends section 328(a) to include compensation “on a fixed or percentage fee basis" in addition to the other specified forms of reimbursement.

Sec. 1207. Effect of Conversion. Section 1207 of the Act makes a technical correction in section 348(f)(2) of the Bankruptcy Code to clarify that the first reference to property, like the subsequent reference to property, is a reference to property of the estate.

Sec. 1208. Allowance of Administrative Expenses. Section 1208 of the Act amends section 503(b)(4) of the Bankruptcy Code to limit the types of compensable professional services rendered by an attorney or accountant that can qualify as administrative expenses in a bankruptcy case. Expenses for attorneys or accountants incurred by individual members of creditors' or equity security holders' committees are not recoverable, but expenses incurred for such professional services incurred by such committees themselves would be.

Sec. 1209. Exceptions to Discharge. Section 1209 of the Act amends section 523(a) of the Bankruptcy Code to correct a technical error in the placement of paragraph (15), which was added to section 523 by section 304(e)(1) of the Bankruptcy Reform Act of 1994. Section 1209 also amends section 523(a)(9), which makes nondischargeable any debt resulting from death or personal injury arising from the debtor's unlawful operation of a motor vehicle while intoxicated, to add “watercraft, or aircraft" after “motor vehicle." Neither additional term should be defined or included as a “motor

vehicle" in section 523(a)(9) and each is intended to comprise unpowered as well as motor-powered craft. Congress previously made the policy judgment that the equities of persons injured by drunk drivers outweigh the responsible debtor's interest in a fresh start, and here clarifies that the policy applies not only on land but also on the water and in the air. Viewed from a practical standpoint, this provision closes a loophole that gives intoxicated watercraft and aircraft operators preferred treatment over intoxicated motor vehicle drivers and denies victims of alcohol and drug related boat and plane accidents the same rights accorded to automobile accident victims under current law. Finally, this section corrects a grammatical error in section 523(e).

Sec. 1210. Effect of Discharge. Section 1210 of the Act makes technical amendments to correct errors in section 524(a)(3) of the Bankruptcy Code caused by section 257(o)(2) of Public Law 99-554 and section 501(d)(14)(A) of Public Law 103-394.[95]

Sec. 1211. Protection Against Discriminatory Treatment. Section 1211 of the Act conforms a reference to its antecedent reference in section 525(c) of the Bankruptcy Code. The omission of "student" before "grant" in the second place it appears in section 525(c) made possible the interpretation that a broader limitation on lender discretion was intended, so that no loan could be denied because of a prior bankruptcy if the lending institution was in the business of making student loans. Section 1211 is intended to make clear that lenders involved in making government guaranteed or insured student loans are not barred by this Bankruptcy Code provision from denying other types of loans based on an applicant's bankruptcy history; only student loans and grants, therefore, cannot be denied under section 525(c) because of a prior bankruptcy.

Sec. 1212. Property of the Estate. Production payments are royalties tied to the production of a certain volume or value of oil or gas, determined without regard to production costs. They typically would be paid by an oil or gas operator to the owner of the underlying property on which the oil or gas is found. Under section 541(b)(4)(B)(ii) of the Bankruptcy Code, added by the Bankruptcy Reform Act of 1994, production payments are generally excluded from the debtor's estate, provided they could be included only by virtue of section 542 of the Bankruptcy Code, which relates generally to the obligation of those holding property which belongs in the estate to turn it over to the trustee. Section 1212 of the Act adds to this proviso a reference to section 365 of the Bankruptcy Code, which authorizes the trustee to assume or reject an executory contract or unexpired lease. It thereby clarifies the original Congressional intent to generally exclude production payments from the debtor's estate.

Sec. 1213. Preferences. Section 547 of the Bankruptcy Code authorizes a trustee to avoid a preferential payment made to a creditor by a debtor within 90 days of filing, whether the creditor is an insider or an outsider. To address the concern that a corporate insider (such as an officer or director who is a creditor of his or her own corporation has an unfair advantage over outside creditors, section

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[95]For a description of these errors, see the appropriate footnote and amendment notes in the United States Code.

547 also authorizes a trustee to avoid a preferential payment made to an insider creditor between 90 days and one year before filing. Several recent cases, including *DePrizio*,[96] allowed the trustee to "reach-back" and avoid a transfer to a noninsider creditor made within the 90-day to one-year time frame if an insider benefitted from the transfer in some way. This had the effect of discouraging lenders from obtaining loan guarantees, lest transfers to the lender be vulnerable to recapture by reason of the debtor's insider relationship with the loan guarantor. Section 202 of the Bankruptcy Reform Act of 1994 addressed the *DePrizio* problem by inserting a new section 550(c) into the Bankruptcy Code to prevent avoidance or recovery from a noninsider creditor during the 90-day to one-year period even though the transfer to the noninsider benefitted an insider creditor. The 1994 amendments, however, failed to make a corresponding amendment to section 547, which deals with the avoidance of preferential transfers. As a result, a trustee could still utilize section 547 to avoid a preferential lien given to a noninsider bank, more than 90 days but less than one year before bankruptcy, if the transfer benefitted an insider guarantor of the debtor's debt. Accordingly, section 1213 of the Act makes a perfecting amendment to section 547 to provide that if the trustee avoids a transfer given by the debtor to a noninsider for the benefit of an insider creditor between 90 days and one year before filing, that avoidance is valid only with respect to the insider creditor. Thus both the previous amendment to section 550 and the perfecting amendment to section 547 protect the noninsider from the avoiding powers of the trustee exercised with respect to transfers made during the 90-day to one year pre-filing period. This provision is intended to apply to any case, including any adversary proceeding, that is pending or commenced on or after the date of enactment of this Act.

Sec. 1214. Postpetition Transactions. Section 1214 of the Act amends section 549(c) of the Bankruptcy Code to clarify its application to an interest in real property. This amendment should be construed in conjunction with section 1201 of the Act.[97]

Sec. 1215. Disposition of Property of the Estate. Section 1215 of the Act amends section 726(b) of the Bankruptcy Code to strike an erroneous reference.[98]

Sec. 1216. General Provisions. Section 1216 of the Act amends section 901(a) of the Bankruptcy Code to correct an omission in a list of sections applicable to cases under chapter 9 of title 11 of the United States Code.

Sec. 1217. Abandonment of Railroad Line. Section 1217 of the Act amends section 1170(e)(1) of the Bankruptcy Code to reflect the fact that section 11347 of title 49 of the United States Code was

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[96]Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186 (7th Cir. 1989); *see, e.g.*, Ray v. City Bank and Trust Co. (*In re* C-L Cartage Co.), 899 F.2d 1490 (6th Cir. 1990); Manufacturers Hanover Leasing Corp. v. Lowrey (*In re* Robinson Bros. Drilling, Inc.), 892 F.2d 850 (10th Cir. 1989).

[97]*See supra* notes 76 and 154 and accompanying text.

[98]For a description of the error, see the appropriate footnote and amendment notes in the United States Code.

repealed by section 102(a) of Public Law 104-88 and that provisions comparable to section 11347 appear in section 11326(a) of title 49 of the United States Code.

Sec. 1218. Contents of Plan. Section 1218 of the Act amends section 1172(c)(1) of the Bankruptcy Code to reflect the fact that section 11347 of title 49 of the United States Code was repealed by section 102(a) of Public Law 104-88 and that provisions comparable to section 11347 appear in section 11326(a) of title 49 of the United States Code.

Sec. 1219. Bankruptcy Cases and Proceedings. Section 1219 of the Act amends section 1334(d) of title 28 of the United States Code to make clarifying references.[99]

Sec. 1220. Knowing Disregard of Bankruptcy Law or Rule. Section 1220 of the Act amends section 156(a) of title 18 of the United States Code to make stylistic changes and correct a reference to the Bankruptcy Code.

Sec. 1221. Transfers Made by Nonprofit Charitable Corporations. Section 1221 of the Act amends section 363(d) of the Bankruptcy Code to restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust. First, the use, sell or lease of such property must be in accordance with applicable nonbankruptcy law and to the extent it is not inconsistent with any relief granted under certain specified provisions of section 362 of the Bankruptcy Code concerning the applicability of the automatic stay. Second, section 1221 imposes similar restrictions with regard to plan confirmation requirements for chapter 11 cases. Third, it amends section 541 of the Bankruptcy Code to provide that any property of a bankruptcy estate in which the debtor is a nonprofit corporation (as described in certain provisions of the Internal Revenue Code) may not be transferred to an entity that is not a corporation, but only under the same conditions that would apply if the debtor was not in bankruptcy. The amendments made by this section apply to cases pending on the date of enactment or to cases filed after such date. Section 1221 provides that a court may not confirm a plan without considering whether this provision would substantially affect the rights of a party in interest who first acquired rights with respect to the debtor postpetition. Nothing in this provision may be construed to require the court to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.

Sec. 1222. Protection of Valid Purchase Money Security Interests. Section 1222 of the Act extends the applicable perfection period for a security interest in property of the debtor in section 547(c)(3)(B) of the Bankruptcy Code from 20 to 30 days.

Sec. 1223. Bankruptcy Judgeships. The substantial increase in bankruptcy case filings clearly creates a need for additional bankruptcy judgeships. In the 105th Congress, the House responded to this need

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[99]For a description of the errors, see the appropriate footnote and amendment notes in the United States Code.

by passing H.R. 1596, which would have created additional permanent and temporary bankruptcy judgeships and extended an existing temporary position. Section 1223 extends four existing temporary judgeships and authorizes 28 additional bankruptcy judgeships.

Sec. 1224. Compensating Trustees. Section 1224 of the Act amends section 1326 of the Bankruptcy Code to provide that if a chapter 7 trustee has been allowed compensation as a result of the conversion or dismissal of the debtor's prior case pursuant to section 707(b) and some portion of that compensation remains unpaid, the amount of any such unpaid compensation must be repaid in the debtor's subsequent chapter 13 case. This payment must be prorated over the term of the plan and paid on a monthly basis. The amount of the monthly payment may not exceed the greater of $25 or the amount payable to unsecured nonpriority creditors as provided by the plan, multiplied by five percent and the result divided by the number of months of the plan.

Sec. 1225. Amendment to Section 362 of Titile11, United States Code. Section 1225 of the Act amends section 362(b) of the Bankruptcy Code to except from the automatic stay the creation or perfection of a statutory lien for an *ad valorem* property tax or for a special tax or special assessment on real property (whether or not *ad valorem*) that is imposed by a governmental unit, if such tax or assessment becomes due after the filing of the petition.

Sec. 1226. Judicial Education. Section 1226 of the Act requires the Director of the Federal Judicial Center, in consultation with the Director of the Executive Office for United States Trustees, to develop materials and conduct training as may be useful to the courts in implementing this Act, including the needs-based reforms under section 707(b) (as amended by this Act) and amendments pertaining to reaffirmation agreements.

Sec. 1227. Reclamation. Section 1227 of the Act amends section 546(c) of the Bankruptcy Code to provide that the rights of a trustee under sections 544(a), 545, 547, and 549 are subject to the rights of a seller of goods to reclaim goods sold in the ordinary course of business to the debtor if: (1) the debtor received these goods while insolvent not later than 45 days prior to the commencement of the case, and (2) written demand for reclamation of the goods is made not later than 45 days after receipt of such goods by the debtor or not later than 20 days after the commencement of the case, if the 45-day period expires after the commencement of the case. If the seller fails to provide notice in the manner provided in this provision, the seller may still assert the rights set forth in section 503(b)(7) of the Bankruptcy Code. Section 1227(b) amends Bankruptcy Code section 503(b) to provide that the value of any goods received by a debtor not later than within 20 days prior to the commencement of a bankruptcy case in which the goods have been sold to the debtor in the ordinary course of the debtor's business is an allowed administrative expense.

Sec. 1228. Providing Requested Tax Documents to the Court. Subsection (a) of section 1228 of the Act provides that the court may not grant a discharge to an individual in a case under chapter 7 unless requested tax documents have been provided to the court. Section 1228(b) similarly provides that the

court may not confirm a chapter 11 or 13 plan unless requested tax documents have been filed with the court. Section 1228(c) directs the court to destroy documents submitted in support of a bankruptcy claim not sooner than three years after the date of the conclusion of a bankruptcy case filed by an individual debtor under chapter 7, 11, or 13. In the event of a pending audit or enforcement action, the court may extend the time for destruction of such requested tax documents.

Sec. 1229. Encouraging Creditworthiness. Subsection (a) of section 1229 of the Act expresses the sense of the Congress that certain lenders may sometimes offer credit to consumers indiscriminately and that resulting consumer debt may be a major contributing factor leading to consumer insolvency. Section 1229(b) directs the Board of Governors of the Federal Reserve to study certain consumer credit industry solicitation and credit granting practices as well as the effect of such practices on consumer debt and insolvency. The specified practices involve the solicitation and extension of credit on an indiscriminate basis that encourages consumers to accumulate additional debt and where the lender fails to ensure that the consumer borrower is capable of repaying the debt. Section 1229(c) requires the study described in subsection (b) to be prepared within 12 months from the date of the Act's enactment. This provision authorizes the Board to issue regulations requiring additional disclosures to consumers and permits it to undertake any other actions consistent with its statutory authority, which are necessary to ensure responsible industry practices and to prevent resulting consumer debt and insolvency.

Sec. 1230. Property No Longer Subject to Redemption. Section 1230 of the Act amends section 541(b) of the Bankruptcy Code to provide that, under certain circumstances, an interest of the debtor in tangible personal property (other than securities, or written or printed evidences of indebtedness or title) that the debtor pledged or sold as collateral for a loan or advance of money given by a person licensed under law to make such loan or advance is not property of the estate. Subject to subchapter III of chapter 5 of the Bankruptcy Code, the provision applies where: (1) the property is in the possession of the pledgee or transferee; (2) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and (3) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law in a timely manner as provided under state law and section 108(b) of the Bankruptcy Code.

Sec. 1231. Trustees. Section 1231 of the Act establishes a series of procedural protections for chapter 7 and chapter 13 trustees concerning final agency decisions relating to trustee appointments and future case assignments. Section 1231(a) amends section 586(d) of title 28 of the United States Code to allow a chapter 7 or chapter 13 trustee to obtain judicial review of such decisions by commencing an action in the United States district court after the trustee exhausts all available administrative remedies. Unless the trustee elects an administrative hearing on the record, the trustee is deemed to have exhausted all administrative remedies under this provision if the agency fails to make a final agency decision within 90 days after the trustee requests an administrative remedy. The provision requires the Attorney General to promulgate procedures to implement this provision. It further provides that the agency's decision must be affirmed by the district court unless it is unreasonable and without cause

based on the administrative record before the agency.

Section 1231(b) amends section 586(e) of title 28 of the United States Code to permit a chapter 13 trustee to obtain judicial review of certain final agency actions relating to claims for actual, necessary expenses under section 586(e). The trustee may commence an action in the United States district court where the trustee resides. The agency's decision must be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency. It directs the Attorney General to prescribe procedures to implement this provision.

Sec. 1232. Bankruptcy Forms. Section 1232 of the Act amends section 2075 of title 28 of the United States Code to a form to be prescribed for the statement specified under section 707(b)(2)(C) of the Bankruptcy Code and to promulgate general rules on the content of such statement.

Sec. 1233. Direct Appeals of Bankruptcy Matters to Courts of Appeals. Under current law, appeals from decisions rendered by the bankruptcy court are either heard by the district court or a bankruptcy appellate panel. In addition to the time and cost factors attendant to the present appellate system, decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack *stare decisis* value.

To address these problems, section 1233 of the Act amends section 158(d) of title 28 to establish a procedure to facilitate appeals of certain decisions, judgments, orders and decrees of the bankruptcy courts to the circuit courts of appeals by means of a two-step certification process. The first step is a certification by the bankruptcy court, district court, or bankruptcy appellate panel (acting on its own motion or on the request of a party, or the appellants and appellees acting jointly). Such certification must be issued by the lower court if: (1) the bankruptcy court, district court, or bankruptcy appellate panel determines that one or more of certain specified standards are met; or (2) a majority in number of the appellants and a majority in number of the appellees request certification and represent that one or more of the standards are met. The second step is authorization by the circuit court of appeals. Jurisdiction for the direct appeal would exist in the circuit court of appeals only if the court of appeals authorizes the direct appeal.

This procedure is intended to be used to settle unresolved questions of law where there is a need to establish clear binding precedent at the court of appeals level, where the matter is one of public importance, where there is a need to resolve conflicting decisions on a question of law, or where an immediate appeal may materially advance the progress of the case or proceeding. The courts of appeals are encouraged to authorize direct appeals in these circumstances. While fact-intensive issues may occasionally offer grounds for certification even when binding precedent already exists on the general legal issue in question, it is anticipated that this procedure will rarely be used in that circumstance or in an attempt to bring to the circuit courts of appeals matters that can appropriately be resolved initially be district court judges or bankruptcy appellate panels.

Sec. 1234. Involuntary Cases. Section 1234 of the Act amends the Bankruptcy Code's criteria for

commencing an involuntary bankruptcy case. Current law renders a creditor ineligible if its claim is contingent as to liability or the subject of a bona fide dispute. This provision amends section 303(b)(1) to specify that a creditor would be ineligible to file an involuntary petition if the creditor's claim was the subject of a bona fide dispute as to liability or amount. It further provides that the claims needed to meet the monetary threshold must be undisputed. The provision makes a conforming revision to section 303(h)(1). Section 1234 becomes effective on the date of enactment of this Act and applies to cases commenced before, on, and after such date.

Sec. 1235. Federal Election Law Fines and Penalties as Nondischargeable Debt. Section 1235 of the Act amends section 523(a) of the Bankruptcy Code to make debts incurred to pay fines or penalties imposed under federal election law nondischargeable.

TITLE XIII. CONSUMER CREDIT DISCLOSURE

Sec. 1301. Enhanced Disclosures under an Open End Credit Plan. Section 1301 of the Act amends section 127(b) of the Truth in Lending Act to mandate the inclusion of certain specified disclosures in billing statements with respect to various open end credit plans. In general, these statements must contain an example of the time it would take to repay a stated balance at a specified interest rate. In addition, they must warn the borrower that making only the minimum payment will increase the amount of interest that must be paid and the time it takes to repay the balance. Further, a toll-free telephone number must be provided where the borrower can obtain an estimate of the time it would take to repay the balance if only minimum payments are made. With respect to a creditor whose compliance with title 15 of the United States Code is enforced by the Federal Trade Commission (FTC), the billing statement must advise the borrower to contact the FTC at a toll-free telephone number to obtain an estimate of the time it would take to repay the borrower's balance. Section 1301(a) permits the creditor to substitute an example based on a higher interest rate. As necessary, the provision requires the Board of Governors of the Federal Reserve System ("Board"), to periodically recalculate by rule the interest rate and repayment periods specified in Section 1301(a). With respect to the toll-free telephone number, section 1301(a) permits a third party to establish and maintain it. Under certain circumstances, the toll-free number may connect callers to an automated device.

For a period not to exceed 24 months from the effective date of the Act, the Board is required to establish and maintain a toll-free telephone number (or provide a toll-free telephone number established and maintained by a third party) for use by creditors that are depository institutions (as defined in section 3 of the Federal Deposit Insurance Act), including a federal or state credit union (as defined in section 101 of the Federal Credit Union Act), with total assets not exceeding $250 million. Not later than six months prior to the expiration of the 24-month period, the Board must submit a report on this program to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives. In addition, section 1301(a) requires the Board to establish a detailed table illustrating the approximate number of months that it

would take to repay an outstanding balance if a consumer pays only the required minimum month payments and if no other advances are made. The table should reflect a significant number of different annual percentage rates, and account balances, minimum payment amounts. The Board must also promulgate regulations providing instructional guidance regarding the manner in which the information contained in the tables should be used to respond to a request by an obligor under this provision. Section 1301(a) provides that the disclosure requirements of this provision are inapplicable to any charge card account where the primary purpose of which is to require payment of charges in full each month.

Section 1301(b)(1) requires the Federal Reserve Board to promulgate regulations implementing section 1301(a)'s amendments to section127. Section 1301(b)(2) specifies that the effective date of the amendments under subsection (a) and the regulations required under this provision shall not take effect until the later of 18 months after the date of enactment of this Act or 12 months after the publication of final regulations by the Board.

Section 1301(c) authorizes the Federal Reserve Board to conduct a study to determine the types of information available to potential borrowers from consumer credit lending institutions regarding factors qualifying potential borrowers for credit, repayment requirements, and the consequences of default. The provision specifies the factors that should be considered. The study's findings must be submitted to Congress and include recommendations for legislative initiatives, based on the Board's findings.

Sec. 1302. Enhanced Disclosure for Credit Extensions Secured by a Dwelling. Subsection (a)(1) of section 1302 of the Act amends section 127A(a)(13) of the Truth in Lending Act to require a statement in any case in which the extension of credit exceeds the fair market value of a dwelling specifying that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes. Section 1302(a)(2) amends section 147(b) of the Truth in Lending Act to require an advertisement relating to an extension of credit that may exceed the fair market value of a dwelling and such advertisement is disseminated in paper form to the public or through the Internet (as opposed to dissemination by radio or television) to include a specified statement. The statement must disclose that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges.

With respect to non-open end credit extensions, section 1302(b)(1) amends section 128 of the Truth in Lending Act to require that a consumer receive a specified statement at the time he or she applies for credit with respect to a consumer credit transaction secured by the consumer's principal dwelling and where the credit extension may exceed the fair market value of the dwelling must contain a specified statement. The statement must disclose that the interest on the portion of the credit extension that exceeds the dwelling's fair market value is not tax deductible for federal income tax purposes and

that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges. Section 1302(b)(2) requires certain advertisements disseminated in paper form to the public or through the Internet that relate to a consumer credit transaction secured by a consumer's principal dwelling where the extension of credit may exceed the dwelling's fair market value to contain specified statements. These statements advise that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges.

Section 1302(c)(1) requires the Federal Reserve Board to promulgate regulations implementing the amendments effectuated by this provision. Section 1302(c)(2) provides that these regulations shall not take effect until the later of 12 months following the Act's enactment date or 12 months after the date of publication of such final regulations by the Board.

Sec. 1303. Disclosures Related to "Introductory Rates". Subsection (a) of section 1303 of the Act amends section 127(c) of the Truth in Lending Act by adding a provision to add further requirements for applications, solicitations and related materials that are subject to section 127(c)(1). With respect to an application or solicitation to open a credit card account and all promotional materials accompanying such application or solicitation involving an "introductory rate" offer, such materials must do the following if they offer a temporary annual percentage rate of interest:

(1) the term "introductory" in immediate proximity to each listing of the temporary annual percentage interest rate applicable to such account;
(2) if the annual percentage interest rate that will apply after the end of the temporary rate period will be a fixed rate, the time period in which the introductory period will end and the annual percentage rate that will apply after the end of the introductory period must be clearly and conspicuously stated in a prominent location closely proximate to the first listing of the temporary annual percentage rate;
(3) if the annual percentage rate that will apply after the end of the temporary rate period will vary in accordance with an index, the time period in which the introductory period will end and the rate that will apply after that, based on an annual percentage rate that was in effect 60 days before the date of mailing of the application or solicitation must be clearly and conspicuously stated in a prominent location closely proximate to the first listing of the temporary annual percentage rate.

The second and third provisions described above do not apply to any listing of a temporary annual percentage rate on an envelope or other enclosure in which an application or solicitation to open a credit card account is mailed. With respect to an application or solicitation to open a credit card account for which disclosure is required pursuant to section 127(c)(1) of the Truth in Lending Act, section 1303(a) specifies that certain statements be made if the rate of interest is revocable under any circumstance or upon any event. The statements must clearly and conspicuously appear in a prominent

manner on or with the application or solicitation. The disclosures include a general description of the circumstances that may result in the revocation of the temporary annual percentage rate and an explanation of the type of interest rate that will apply upon revocation of the temporary rate.

To implement this provision, section 1303(b) amends section 127(c) of the Truth in Lending Act to define various relevant terms and requires the Board to promulgate regulations. The provision does not become effective until the earlier of 12 months after the Act's enactment date or 12 months after the date of publication of such final regulations.

Sec. 1304. Internet-Based Credit Card Solicitations. Subsection (a) of section 1304 of the Act amends section 127(c) of the Truth in Lending Act to require any solicitation to open a credit card account for an open end consumer credit plan through the Internet or other interactive computer service to clearly and conspicuously include the disclosures required under section 127(c)(1)(A) and (B). It also specifies that the disclosure required pursuant to section 127(c)(1)(A) be readily accessible to consumers in close proximity to the solicitation and be updated regularly to reflect current policies, terms, and fee amounts applicable to the credit card account. Section 1304(a) defines terms relevant to the Internet.

Section 1304(b) requires the Federal Reserve Board to promulgate regulations implementing this provision. It also provides that the amendments effectuated by section 1304 do not take effect until the later of 12 months after the Act's enactment date or 12 months after the date of publication of such regulations.

Sec. 1305. Disclosures Related to Late Payment Deadlines and Penalties. Subsection (a) of section 1305 of the Act amends section 127(b) of the Truth in Lending Act to provide that if a late payment fee is to be imposed due to the obligor's failure to make payment on or before a required payment due date, the billing statement must specify the date on which that payment is due (or if different the earliest date on which a late payment fee may be charged) and the amount of the late payment fee to be imposed if payment is made after such date.

Section 1305(b) requires the Federal Reserve Board to promulgate regulations implementing this provision. The amendments effectuated by this provision and the regulations promulgated thereunder shall not take effect until the later of 12 months after the Act's enactment date or 12 months after the date of publication of the regulations.

Sec. 1306. Prohibition on Certain Actions for Failure to Incur Finance Charges. Subsection (a) of section 1306 of the Act amends section 127 of the Truth in Lending Act to add a provision prohibiting a creditor of an open end consumer credit plan from terminating an account prior to its expiration date solely because the consumer has not incurred finance charges on the account. The provision does not prevent the creditor from terminating such account for inactivity for three or more consecutive months.

Section 1306(b) requires the Federal Reserve Board to promulgate regulations implementing the amendments effectuated by section 1306(a) and provides that they do not become effective until the later of 12 months after the Act's enactment date or 12 months after the date of publication of such final regulations.

Sec. 1307. Dual Use Debit Card. Subsection (a) of section 1307 of the act provides that the Federal Reserve Board may conduct a study and submit a report to Congress containing its analysis of consumer protections under existing law to limit the liability of consumers for unauthorized use of a debit card or similar access device. The report must include recommendations for legislative initiatives, if any, based on its findings.

Section 1307(b) provides that the Federal Reserve Board, in preparing its report, may include analysis of section 909 of the Electronic Fund Transfer Act to the extent this provision is in effect at the time of the report and the implementing regulations. In addition, the analysis may pertain to whether any voluntary industry rules have enhanced or may enhance the level of protection afforded consumers in connection with such unauthorized use liability and whether amendments to the Electronic Fund Transfer Act or implementing regulations are necessary to further address adequate protection for consumers concerning unauthorized use liability.

Sec. 1308. Study of Bankruptcy Impact of Credit Extended to Dependent Students. Section 1308 of the Act directs the Board of Governors of the Federal Reserve to study the impact that the extension of credit to dependents (defined under the Internal Revenue Code of 1986) who are enrolled in postsecondary educational institutions has on the rate of bankruptcy cases filed. The report must be submitted to the Senate and House of Representatives no later than one year from the Act's enactment date.

Sec. 1309. Clarification of Clear and Conspicuous. Subsection (a) of section 1309 of the Act requires the Board (in consultation with other Federal banking agencies, the National Credit Union Administration Board, and the Federal Trade Commission) to promulgate regulations not later than six months after the Act's enactment date to provide guidance on the meaning of the term "clear and conspicuous" as it is used in section 127(b)(11)(A), (B) and (C) and section 127(c)(6)(A)(ii) and (iii) of the Truth in Lending Act.

Section 1309(b) provides that regulations promulgated under section 1309(a) shall include examples of clear and conspicuous model disclosures for the purpose of disclosures required under the Truth in Lending Act provisions set forth therein.

Section 1309(c) requires the Federal Reserve Board, in promulgating regulations under this provision, to ensure that the clear and conspicuous standard required for disclosures made under the Truth in Lending Act provisions set forth in section 1309(a) can be implemented in a manner that results in disclosures which are reasonably understandable and designed to call attention to the nature and

significance of the information in the notice.

TITLE XIV. PREVENTING CORPORATE BANKRUPTCY ABUSE

Sec. 1401. Employee Wage and Benefit Priorities. Section 1401 of the Act amends Bankruptcy Code section 507(a) to provide heightened protections for employees by increasing the monetary cap on wage and employee benefit claims entitled to priority under the Bankruptcy Code from $4,650 to $10,000 and lengthens the reachback period for wage claims from 90 days to 180 days. As few employees will continue working without pay for an extended period, the principal effect of extending the time period to 180 days is that a greater portion of unpaid vacation, severance, and sick leave pay will be entitled to priority payment.

Sec. 1402. Fraudulent Transfers and Obligations. Section 1402 of the Act amends section 548 of the Bankruptcy Code to enhance the recovery of avoidable transfers and excessive pre-petition compensation, such as bonuses, paid to insiders of a debtor. It effectuates two changes to current law that would make it easier for a trustee to avoid pre-petition transfers. First, section 1402(1) extends the one-year reach-back period for fraudulent transfers to two years. Second, section 1402(2) amends Bankruptcy Code section 548(a) to clarify that it permits the recovery of any transfer to or an obligation incurred for the benefit of an insider under an employment contract, under certain conditions. In addition, section 1402 adds a new provision to section 548 authorizing a bankruptcy trustee to avoid any transfer of an interest of the debtor in property that was made on or within the ten-year period preceding the filing of the debtor's bankruptcy case if: (a) the transfer was made to a self-settled trust or similar device; (b) the transfer was made by the debtor; (c) the debtor is a beneficiary of such trust or similar device; and (d) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted. For purposes of this provision, a transfer includes a transfer made in anticipation of any money judgment, criminal fine, or similar obligation or which the debtor believed would be incurred as a result of: (1) a violation of federal or state securities laws, regulations, or orders; or (2) fraud, deceit, or manipulation in fiduciary capacity or in connection with the purchase or sale of a security under specified provisions of the federal securities laws.

Sec. 1403. Payment of Insurance Benefits to Retired Employees. Current bankruptcy law prevents a chapter 11 debtor from unilaterally modifying certain retiree benefits, such as health insurance, during the pendency of the bankruptcy case unless an authorized retiree representative is appointed and agrees to the modification, or the court authorizes the modification. Section 1403 amends Bankruptcy Code section 1114 to prevent debtors from evading these requirements by terminating retiree benefit plans on the eve of bankruptcy. The amendment would require retroactive reinstatement of retiree benefits that were modified within 180 days *before* the debtor filed for bankruptcy protection, unless the court finds that the balance of the equities clearly favors the modification.

Sec. 1404. Debts Nondischargeable If Incurred in Violation of Securities Fraud Laws. Bankruptcy Code section 523(a)(19) makes certain debts nondischargeable that result from the violation of any Federal securities law, state securities law, or any regulation or order issued under such Federal or state securities law nondischargeable. Section 1404 amends Bankruptcy Code section 523(a)(19)(B) to provide that it applies to debts that result before, on, or after the date on which the petition was filed from any judgment, order, consent order, decree, settlement agreement, or from any court or administrative order for damages or for other specified payments owed by the debtor. Section 1404 is effective as of July 30, 2002.

Sec. 1405. Appointment of Trustee in Cases of Suspected Fraud. Section 1405 amends Bankruptcy Code section 1104 to require the United States trustee to move for the appointment of a trustee if there are reasonable grounds to suspect that current members of a chapter 11 debtor's governing body, chief executive officer, chief financial officer, or members of the debtor's governing body who selected the debtor's chief executive officer or chief financial officer participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

Sec. 1406. Effective Date; Application of Amendments. Section 1406 provides that title XIV, with the exception of one provision, takes effect on the date of enactment of this Act and the amendments apply only to cases commenced after such date. The exception applies to section 1402(1) of the Act, which applies only to cases commenced under the Bankruptcy Code more than one year after the date of enactment of this Act.

TITLE XV. GENERAL EFFECTIVE DATE; APPLICATION OF AMENDMENTS

Sec. 1501. Effective Date; Application of Amendments. Subsection (a) of section 1501 of the Act states that the Act shall take effect 180 days after the date of enactment, unless otherwise specified in this Act. Section 1501(b) provides that the amendments made by this Act shall not apply to cases commenced under the Bankruptcy Code before the Act's effective date, unless otherwise specified in this Act. The provision specifies that the amendments made by sections 308, 322 and 330 shall apply to cases commenced on or after the date of enactment of this Act.

Sec. 1502. Technical Corrections. In light of the renumbering of a paragraph in Bankruptcy Code section 507 as effected by section 212 of this Act, section 1502 corrects various cross-references in the Bankruptcy Code to reflect such renumbering.